AMERICAN BAR ASSOCIATION

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House of Delegates Holds Successful and Significant Mid-Winter Meeting

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"Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash; 't is something, nothing;
'T was mine, 't is his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed."

Othello. Act iii., Sc. 3

IT was true in Cyprus in 1570 when Iago said it to Othello. It was true in England about 1600 when Shakespeare wrote the play and it was first produced. It is true in America today. It is an eternal verity that "he who robs me of my good name makes me poor indeed."

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THE House of Delegates of the American Bar Association held a highly successful and significant mid-winter meeting on January 9-10, at the Edgewater Beach Hotel, Chicago. After full debate by a representative body of 145 delegates, action was taken on a number of matters which have elicited widespread public interest and commendation. This issue of the JOURNAL contains a detailed account of the proceedings.

To those who have watched closely the development of the House as the policy-determining body of the Association, the January meeting marked a still further advance, as compared with its previous sessions. A feature of the meeting was the active part taken by a larger number of members of the House, particularly from State and local Bar Associations, which had the effect of eliciting a truer cross-section of opinion from the forty-eight States and the District of Columbia. Division and differences of opinion there were, on a variety of subjects; but cordial acceptance of the majority decision was manifest after each debate.

It was a working meeting. Three sessions were held on Monday, January 9, the night session lasting until after midnight. Business was completed and adjournment taken soon after noon Tuesday. The only social function was a delightful informal supper tendered by President Hogan Sunday evening, to the members of the House and the Chairmen and members of Committees and Section Councils present in Chicago. Although the meeting had been called for the consideration primarily of a few major reports, any congestion of the House calendar at the San Francisco meeting will be considerably reduced, through clearance of the controversial matters disposed of at the Chicago sessions.

"The State of the Association"

Aside from the volume and importance of the business dispatched under the genial but firm ministry of Chairman Thomas B. Gay of Virginia, a notable event was the report on "the state of the Association," presented by President Frank J. Hogan in opening the first session. His was a heart-to-heart talk with the men charged with responsibility and leadership in behalf of the Association in the respective States and in the various Sections and Committees. First he stated the situation as to membership, which during the past few years has continued to gain steadily and healthily, without the impetus of membership "drives." In 1929, the Association had 27,411 members, but the depression dropped this to 25,951 in 1934. With the proposal and adoption of the present representative structure of the Association, in which the average member has an opportunity to take part, an increase in membership began and has since continued, with 27,000 members in 1935 and 31,735 as of the beginning of 1939—"a new all-time high." Deaths have taken a heavy toll since the Cleveland meeting last July; resignations have been few; the net increase has been about 1,000 members.

Especially interesting was President Hogan's confirmation, elsewhere quoted, of the thoroughly representative character of the House of Delegates and the constituencies represented. The House now has 177 members. The 52 State Delegates are chosen by the 31,735 members of the Association. The 71 State Bar Association Delegates are chosen by and from organizations which, according to the latest figures, contain some 83,929 lawyers—probably more than half of the practicing lawyers in the United States. The local Bar Associations, which are represented in the House directly or through the new Section of Bar Organization Activities, have a total membership of about 118,600, although some of those organizations are by no means active.

President Hogan announced that the various new Committees called for by actions taken at the Cleveland meeting had all been appointed, making a large addition to the "official family" of the Association. These included the Committee on the Bill of Rights, a Committee in each State to work for the adoption of the procedural reforms recommended by the Section of Judicial Administration last July, a Membership Committee to seek desirable new members in each State and the District of Columbia, and a Committee on Admissions in each State and the District of Columbia, charged with the duty of passing on applications for membership from lawyers in its territory.

"Volunteer" vs. "Paid" Work for Association Objectives

The remarks of the President also gave the House a frank picture as to the problems besetting those

charged with budgetary responsibility in behalf of the Association—a problem of constant pressure for new, broadened and intensified activities on the part of multiplying Committees, Sections, and Section Committees, far beyond what can be financed from the receipts from dues and the moderate rate of increase in revenues from that source. President Hogan referred also to the recurring suggestion that various Committees and Sections should be permitted to employ laymen or lawyers on salaries, to do full-time work in behalf of Association objectives. Applause greeted his expression of strong preference that the Association should undertake only such tasks of advocacy as can be carried forward through the "volunteer" efforts of its members actuated by a sense of duty to the profession and the public. He declared that the best way to advance the good repute of the profession is to "do good works" which command the approbation of the public.

Nomination of Officers and Governors

The State Delegates utilized the occasion to hold, earlier than usual, their prescribed meeting for nominations. Charles A. Beardsley, of Oakland, California, long an indefatigable worker in behalf of the Association, was the unopposed designee for the presidency. Secretary Harry S. Knight, of Pennsylvania, and Treasurer J. Howard Voorhees, of South Dakota, were re-named, for faithful service. The unanimous nominees for three-year terms in the Board of Governors were: First Circuit, George R. Grant, State Delegate from Massachusetts; Second Circuit, Philip J. Wickser, State Bar Association Delegate from New York; Sixth Circuit, Carl J. Essery, State Bar Association Delegate from Michigan; Tenth Circuit, Dexter Blount, State Delegate from Colorado, President of the Colorado Bar Association.

Unless independent nominations are made by petition, these nominees of the State Delegates will be elected without opposition next July; and Mr. Beardsley will assume the presidency at a meeting held in his home State.

In deference to a feeling that the selection of members of the Board of Governors is too greatly restricted by the requirement that they be chosen from members of the House of Delegates at the time of their nomination, notice was given of a considered amendment to the Constitution, to be voted on by the Assembly and House at the San Francisco meeting, whereby election to the Board of Governors would be opened to those who "are or have been" members of the House. The present restrictive provision of the 1936 Constitution was based on a purpose that the Board of Governors should be and remain a subordinate and administrative agency of the House, made up of members of that body and responsible to it, and should acquire no status as a coordinate but less numerous legislative body of the Association. Experience during nearly three years is deemed to have indicated that this provision too narrowly restricts the choice and that the Governors from the respective circuits can now safely be chosen from among those who are or have been familiar with the work and traditions of the House as the sole policy-determining body of the Association. The proposed relaxing of the limitation may provoke lively debate, and the proposal to amend is likely to have both advocates and opponents, in the Assembly and House next July.

"Review" Procedure as to Administrative Agencies

The meeting fulfilled the purpose for which it was principally convened, in that it perfected and approved the bill drafted and recommended by the Committee on Administrative Law, of which O. R. McGuire of the District of Columbia is chairman. Lack of opportunity for sufficient debate had previously led to approval of the bill in principle, without sanction for its introduction. Meanwhile, the bill has been consistently improved, in the light of suggestions received. The bill as amended and approved by the House with authority for its submission to the Congress, is printed elsewhere in this issue.

The House discussed the bill section by section, and at times "line by line." Attempts to recommit or defeat it, or to amend it in respects variant from its basic plan, were defeated. Many members of the House were sympathetic with a proposal to broaden the scope of "judicial review" of the findings of administrative agencies, but a majority held to the idea that the House should recommend at this time no more than the broadening provision recommended by the Committee as having a reasonable prospect of enactment. On the issue of the forum for "administrative review," probably a majority of the House would have strongly preferred a provision for "independent" boards in no way dependent, as to appointment or tenure, upon the officer or agency whose rules or rulings were to be reviewed; but here again a decisive majority of the House heeded the pleas for a recommendation at this time within limits of practicability; viz., for intra-departmental boards of review, before which a hearing could be had and a record made for judicial review if need be. So long as the providing of this "alternate remedy" did not abate or impair any of the rights and remedies of the citizen if he elected to go to Court in first instance, the majority of the House were willing to approve the Committee's plan for intra-departmental boards of review.

The Principal Amendment Adopted

Probably a decisive factor in the ultimate approval of the Committee's bill was its early amendment in a substantial particular which seems likely to have far-reaching significance. This amendment was drafted by Major E. B. Tolman of Illinois, introduced and urged by Last Retiring President Vanderbilt, seconded by President Hogan, and adopted by the House without opposition.

As drafted by the Committee, Section 1 of that bill imposed a mandatory requirement on every administrative body to pass, within 90 days, rules implementing the various statutes which they are given power to administer, including rules of procedure for the hearing and determination of controversies between private citizens and the government or with any of its administrative agencies. From many different sources there arose objections to the following effect: Why should the House authorize scores or hundreds of administrative bodies to prescribe each its own set of rules for conducting the business of administrative agencies in the hearing and determining of controversies, when the Bar and the country have just escaped from complex and voluminous procedural statutes by uniform civil Rules prescribed by the Supreme Court?

So the amendment of Section 1 was proposed and adopted, to limit the rule-making power of the individual agency to matters other than procedure, and to authorize and request the Supreme Court of the United States to prescribe uniform rules of procedure applicable generally to all of the administrative tribunals. The power and duty which would be vested in the Supreme Court by this provision approved by the

House of Delegates without a dissenting vote are not such as the Court would seek, or hardly decline if enacted into law. Litigants, the Courts, and the administrative tribunals, would be saved a great deal of time, expense, friction, and litigation if the Supreme Court itself drafted and prescribed basic rules for the hearing and disposition of controversies before the administrative tribunals and the ending of abuses such as the Supreme Court has criticized in several recent decisions where individual agencies had tried to determine and prescribe for themselves the procedure which constituted fair trial and decision according to due process of law.

These controversies are in their nature between the asserted duties and powers of government on one hand and the claimed interests and rights of individual citizens on the other. If the hearing of these controversies had not been delegated by statute to these administrative agencies in first instance, their determination would still be in proper cases within the primary jurisdiction of the Federal Courts. Partaking of the nature of controversies in which a part of the process of judicial determination according to the facts and the law has in effect been entrusted in first instance to the administrative tribunals rather than the Courts, the House was evidently of the opinion that the basic procedural rules for the hearing and disposition of those controversies before the multiplicity of agencies should be uniform and should be placed within the province of the Supreme Court, which has so notably ended the diversities and conflicts in Federal civil procedure.

Association Intervention in Litigation

A healthy difference of opinion manifested itself in the House proceedings, as to the propriety and procedure of Association intervention, through authorized Sections or Committees, in litigation involving legal issues upon which the Association has taken a stand. Such limited intervention under proper authority and supervision has for many years been sanctioned by express provisions of the organic law of the Association, and is now regulated by Article XI of the By-laws, which provides that

"No Section or Committee shall assume to represent the Association in any Court or in a controverted procedure before any other tribunal unless authorized so to do by the House of Delegates or by the Board of Governors; or, in case of emergency, by the President."

Question arose as to the filing of a brief *amicus curiae*, with leave of the United States Circuit Court of Appeals for the Third Circuit, by the Special Committee on the Bill of Rights, in the litigation between the Congress for Industrial Organization and Mayor Frank Hague of Jersey City, involving issues as to the right of public assembly in municipal parks, etc. This Committee had been empowered by resolution of the House of Delegates in Cleveland on July 29, 1938, to take such a step where it was deemed to be warranted (see January, 1939, JOURNAL, page 9), subject to the approval of the President of the Association, who granted permission in the Jersey City case.

Ex-Judge Robert Carey of Jersey City, supported by some members of the House, tried to amend this resolution so as to require hereafter the consent of the Board of Governors. Several spirited colloquies with Chairman Grenville Clark resulted, which are elsewhere reported. Judge Carey's resolution was not passed or voted on. The Committee made it clear that it did not conceive itself to have any "roving commission" to intervene generally in litigation where the Bill of Rights is claimed by some one to be in jeopardy. The name of the Committee was changed to the shorter title of the Special Committee on the Bill of Rights; and its membership was increased from nine to twelve, in pursuance of which President Hogan added Charles P. Taft, II, of Ohio, Dean Lloyd K. Garrison of the University of Wisconsin Law School, and Ross L. Malone, Jr., of New Mexico and the Junior Bar.

Meanwhile, the House passed without opposition a resolution empowering the Section of Patent Law to file an intervenor's brief in a patent suit pending before the Supreme Court, upon the single issue as to whether Section 4886 of the Revised Statutes shall be construed as having a meaning and effect for which the House had hitherto recommended an amendment of Section 4886.

The Association and International Affairs

One of the most significant and clearly-developed manifestations of the meeting revealed an increasing caution and doubt as to the extent to which the House is authorized to go and should go, in adopting resolutions as to the acts or policies of foreign governments. This attitude was an extension of that expressed as to some resolutions at the Cleveland sessions last July, and had been heightened by the increasing delicacy of the international situation in the intervening months. In part, the questioning arose from the limited scope of the stated "object" of the Association, as set out in Article I of its Constitution, together with the fact that relatively few of the State and local Bar Associations give active consideration to international affairs, with the result that some of their delegates doubted the authority of the representative body to act as to such matters in a time of international stress.

A resolution with distinguished sponsors, dealing with the treatment of religious and racial minorities in countries denying due process of law, was withdrawn because of "a consensus of opinion" doubting how far the House is authorized to speak for lawyers on such a matter. Several resolutions emanating from the Council of the Section of International and Comparative Law and dealing principally with international matters, were withdrawn by the Chairman of the Section, after the House had referred back to the Section the first resolution, which related to the expropriation of oil lands by the Mexican Government.

Other Significant Action Taken

The account of the proceedings of the House should be examined by members of the Association, to note the variety and importance of the actions taken. Upon the timely topic of labor and social security laws, including the National Labor Relations Act, nine important recommendations by the Association's Committee were adopted by the House without change; and the Association thereby took an advanced and remedial position on questions of labor legislation. The economic condition of lawyers received sympathetic consideration, and a plan for fact-finding was approved. The Ashurst bill to create an Administrative Office of the Courts of the United States was approved in principle, and steps looking to an increase in Federal judicial salaries were authorized. This summary is by no means inclusive; in addition, a great deal of administrative and routine business of the Association was disposed of, to give the House a less crowded calendar next July.

Chairman Thomas B. Gay presided over the House for the first time, and won approval for his impartiality, crispness of rulings, and readiness to encourage full debate, especially by the newcomers to the House. President Hogan assumed and exercised an active floor

leadership in support of the major recommendations of Committee and Sections. The arrangements and facilities for the sessions at the Edgewater Beach Hotel were unusually convenient, and the proximity of Headquarters facilitated the oft-needed services of mimeographing and permitted ready reference to Association files.

First Session—President Hogan Speaks—Ashurst Bill Approved in Principle—Debate on Report of Committee on Administrative Law Begins—Important Amendment Adopted Empowering Supreme Court to Prescribe Uniform Rules of Practice and Procedure in This Field.

THE House of Delegates devotes itself promptly to business. The roll-call shows 145 Delegates present. President Hogan first reports on "the state of the Association." Membership is at the "new all-time high" of 31,735. Delegates from State Bar Associations represent 83,929 lawyers, and there are 118,600 members of local Bar Associations. President Hogan states that increased work by the Association is beyond the limit of financial resources, and pleads for "volunteer service." Many significant resolutions are heard, and issues as to foreign affairs arise. The Ashhurst bill for an Administrative Office of the Courts of the United States is approved in principle. All-day debate on the report and bill of the Committee on Administrative Law begins, and a minority amendment is rejected. An important amendment is adopted to empower the Supreme Court to prescribe uniform rules of procedure in this field. The wisdom of holding a mid-winter meeting for adequate consideration of the bill is fully confirmed, as the debate goes forward on a high plane, with many members of the House expressing their views freely at all stages.

THE mid-winter meeting of the House of Delegates convened in the Attractive ball-room of the Edgewater Beach Hotel, Chicago, promptly at 10:00 o'clock on the morning of Monday, January 9, 1939. All arrangements for the sessions were most adequate and convenient, and facilitated the dispatch of business. Nearly all members of the House were in their seats when the gavel, in the hands of President Frank J. Hogan, called for order.

The roll-call by Secretary Harry S. Knight confirmed the presence of a thoroughly representative attendance. Out of a total membership of 177 members of the House as now constituted, including *ex officio* members, the roster showed 145 members present at this meeting. A few members were unavoidably kept away by Court engagements or illness. Chairmen of Committees, members of Association and Section Committees and Councils of Sections, constituted a gallery of interested auditors, with the Chairmen of Association Committees moving to the floor when matters pertaining to the reports or work of their Committees were under consideration. Solicitor-General Robert H. Jackson, who has long been active in the work of the Association and was at one time Chairman of the former Conference of Bar Association Delegates, took his seat with the New York delegation, and greeted many friends.

Chairman Morris B. Mitchell of Minnesota presented the report of the Committee on Credentials, which was adopted. It showed the changes in the roster of the House since the Cleveland meeting. The Secretary's transcript of record of the sessions held in Cleveland last July stood approved.

President Hogan Announces "A New All-Time High" in Membership

Before turning the gavel over to Chairman Thomas B. Gay of the House of Delegates, President Hogan addressed the House concerning "the state of the Association." He first evoked enthusiasm by the announcement that the membership of the Association has continued to gain and was then 31,735—a new all time high. "We heard with gratification," he said, "President Vanderbilt announce at the Cleveland meeting that by that time the membership of this Association had reached a high for all time. Since last July the progress in the direction of increased membership has been maintained. Today there are 31,735 members of the legal profession as members of the American Bar Association—a new all-time high. Since we met at Cleveland last July, approximately 1,000 new members have come into the Association. That figure is reached after deducting the few resignations, the deaths, and the few members who were dropped for non-payment of dues, so we have a net increase of approximately 1,000.

"Something more gratifying than that, however, is to be found in the present strength of this Association. All of us are quite familiar with the fact that organizations of all kind have had extreme difficulty in maintaining their membership during the depression which has now been with us for approximately nine years. That was only temporarily true with the American Bar Association.

"At the height of what has now come to be called the lush times in this country, in 1929, the American Bar Association had a total membership of 27,411. Temporarily we dropped so that in 1934, at the time of our annual meeting, we had a total membership of 25,951, and then, despite the continued poor economic conditions, the climb upward commenced, a climb upward not as a result of any spectacular sales campaign or drive for membership, but a healthy, real progress towards greater membership, so that in 1935 we had over 27,000 members. In 1936 we had over 28,000 members. In 1937, we had 29,452. When we met in Cleveland we had 30,820, and, as I have already said, today we have 31,735 members of this Association.

* * *

Membership of Bar Associations

"You have already been told something about the number of local and State Associations. I said a mo-

ment ago that this body was truly the congress of the legal profession of the United States, which the new Constitution, adopted at Boston, intended it should be. Our membership, as compared with the membership of State organizations, is not as large as it should be, but nevertheless it does not make an ungratifying record. We have today eighteen integrated State Bars, in the States of Alabama, Arizona, California, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah and Washington.

"Those eighteen integrated State Bars, it will interest you to note, have a total membership, according to our records, of approximately 41,400. The other State Bar Associations, the voluntary State Bar Associations, have, according to our present record, a membership of 42,524. One can easily see that, when we compare thirty—or, with the District of Columbia, thirty-one—non-integrated Bar Associations against eighteen State integrated Bar Associations, how different the membership is! The eighteen have a membership approximately as great as all the voluntary Associations combined. That makes a grand total of 83,929 lawyers who are as of this date, according to our records, members of State Bar Associations throughout the Union, and all of those State Bar Associations are represented, irrespective of the number of members they have in our Association.

FRANK J. HOGAN
President of the American Bar Association

"It is interesting to note that we have, according to our records (and we think our records are accurate) 1,000 local Bar Associations more or less active, and having on their rolls at this time some 118,600 lawyers as members.

Representative Membership of the House

"I want to call your attention—because sometimes it is overlooked by our own membership—to the make-up of the House of Delegates, emphasizing again that it has become, as a result of our democratic, representative plan, a really representative body, not only of the Association itself, which it primarily is, but of the profession of law and our country.

"We have 177 members of this House. Fifty-two State Delegates representing the forty-eight States, the District of Columbia, Hawaii, Puerto Rico, and the territorial group. There are eighty-five Bar Asociations represented by delegates now having seats here; seventy-one delegates from State Bar Associations and

fourteen from local Bar Associations. By provisions of the Constitution, all members of the Board of Governors, an organization about which I shall speak briefly later, are also members of the House, and that accounts for sixteen.

"In addition to that we have thirteen Section Chairmen, five Assembly Delegates, four delegates representing affiliated organizations, and those delegates who are members of our House by reason of their position, such as the Attorney General of the United States, the Solicitor General of the United States, the Presidents of the National Conference of Commissioners on Uniform State Laws, of the Association of American Law Schools, and of the National Association of Attorneys General, and the Chairman of the National Conference of Judicial Councils and of the National Conference of Bar Examiners. That, again, I respectfully submit to you, indicates an exceedingly representative body of men.

We Meet to Serve Public Interests

"We come together by virtue of the provisions of our Constitution at least once a year; and for the second time in the short life of the House, we have met twice a year, as a result of your own action in so providing. We come together on these occasions, my fellow members, laying aside for the time being our private interests, for the purpose of rendering a public service—a service not primarily in the interests of the profession but in the interest of the betterment of the administration of justice and, best of all things, in the interest of the public good. One has but to cast his eye down the calendar prepared for the consideration of the House at this meeting, to observe the vital, current importance of some of the subjects which you will consider here today and tomorrow. Outstanding you will find the consideration which you are asked to give to legislation in the Federal field dealing with that increasingly important subject, administrative law, and you will find (most of you have already read it) an exceedingly informative report, with very important recommendations, on the subject of laws relating to labor, wages and hours and social security. To those, as well as to the other subjects on the calendar, I commend your most earnest attention.

New Committees All Appointed

"Last year this House provided for new Committees, for Committees to advocate the adoption by the States of the Union, so far as applicable, of those judicial procedural requirements which were recommended by the seven Committees of our Section on Judicial Administration. Throughout the country I have been advocating earnest, careful study of those recommendations and their adoption in the several States so far as applicable to conditions in those States. Those Committees have been appointed, with a separate committee for each State of the Union; and they greatly enlarge the personnel of our Committees and our direct activities with State and local Bar Associations. You provided also that there should be appointed in each State a Membership Committee, and they have been appointed, giving us, again, a greatly increased number of Committees and personnel.

Increased Work Taxes Our Resources

"It is in connection with the appointment of these new committees that I strike perhaps the only sour note that I have to call to your attention today. Despite our increased membership, the constantly increased call upon our resources, for the doing of the public work which our Sections and our committees and our Association is always endeavoring to do, is becoming burdensome indeed.

"It is not possible in this year, with our present set-up and our present resources—unless we have a fortunate break which we do not now foresee—to go through the year without a deficit; and it has been the rather proud claim of this Association that even in times of stress we have balanced our budget, year after year.

"There is a constant increase in recommendations to this Association that it enlarge its paid workers. I speak of this with some chagrin. But from a number of Committees and Sections we have had the serious recommendation that for their purposes we ought to have an all-time paid field secretary to go from place to place to advocate the adoption of our recommendations, to do the work heretofore done not only by our Committees and Sections and their chairmen but by our members at large.

Paid Staffs Not Preferable to Volunteer Work

"Recommendations have come (I will not enumerate them) for the hiring or employing of lawyers and laymen to carry out work thought to be good for the American Bar Association, that, in the aggregate, would take all of our resources. May I mention just one of them? A man of great experience has suggested that we employ, in order to publicize the nobility of the legal profession, a publicity man or public relations counsel at a salary of $25,000 a year. Well, I think we all know that the only way you can publicize the good work of the legal profession is by doing good works and extending them. (Applause)

"I have mentioned that, by your mandate, the President of the Association appointed a separate Committee on Membership in each State. It will interest you to know that in good faith and all seriousness, one State Membership Committee alone suggested that it would need an appropriation of from $10,000 to $15,000 a year, in order to carry on membership work within that State.

"May I suggest to the House of Delegates that we give thought to the value of volunteer service for the good of the profession and the good of the public, as compared with paid service. And may I express the opinion to you that, when lawyers cease, as I insist they are not ceasing, to take time out from their own private practice to come, as you gentlemen have come, to render a service to the organized bar and, through the organized bar, to the public—the only service of that kind which is worth while is the volunteer service of the profession, and we should adhere to that—when that fails, then we should take the consequence of the failure.

"I spoke a little while ago of the insistence, the increasing insistence, that we have paid service. Of course, when I speak of volunteer service I recognize, as we all must recognize, that time given, or the time of our office force given, is never a thing for which we seek compensation, but, at the same time, when we call upon officers and members of our organization to go from place to place and incur out-of-pocket disbursement in the rendition of service, those expenses must be reimbursed. That, of course, is true of this body as it is true of all of your Sections and Committees.

Additional Members Needed

"I wonder if it would be remembered after the meeting tomorrow if in considerable earnestness now I ask each one of the one hundred and seventy-one-odd members of this body to constitute himself, for the

rest of this Association year or until we gather again in San Francisco next July, a voluntary chairman of a volunteer membership committee in his own State, and make a real endeavor, not single-handed but with such help as he can enlist among his brother members of the A. B. A. in his State, to account, by next July, for twenty-five new members.

"I say to you, gentlemen, after consulting the Treasurer and the Executive Secretary that, if that can be done, the financial concern which is today graying the hair of your Budget Committee will be eliminated for the time being. We ought easily to be able to bring our Association's membership up to around 35,000. It can be done. Will you undertake to see how far we can get along with it?

Board of Governors a Committee of the House

"There has been from time to time, an apparent misunderstanding on the part of some members of the House, of the relationship and the functions to be performed by the Board of Governors in relation to the House. From time to time very important matters have been reported by our Board of Governors to the House, with comments and recommendations. And occasionally some of us have noted the House taking, and correctly taking, the position that the Board of Governors is a mere servant of the House and an agency of it, and that the House is as well positioned, without the Board's recommendation, to consider the subjects on which the Board has commented as the Board is.

"I am sure that the members of the House would like to have their minds refreshed with respect to the functions of the Board of Governors in relation to this body as actually commanded by the Constitution and by the Rules of the House.

"After providing for a Board of Governors and how it shall be constituted, the Constitution of this organization provides that

"'Subject in all respects to the authority and discretion of the House of Delegates and between its meetings, the Board of Governors shall be the administrative board of the Association and shall have the power and authority to do and perform all acts and functions which the House of Delegates itself might do or perform, not inconsistent with the Constitution and By-Laws or with any action taken by the House of Delegates.'

"You will note, therefore, that during those periods when the House is not itself in session, the Board of Governors by the express provision of our Constitution is the *alter ego*, the representative, the agency of the House, to carry on, as it must needs be carried on, the functions of the Association until the House can again meet, and particularly to carry out the mandates of the House declared by it at its periodic meetings.

"But you have by the Constitution and, as I shall show you in a few moments, by your own Rules, given other functions and other duties and imposed other obligations on the Board of Governors. The Constitution provides in Article IX that

"'Each Section and Committee of the Association shall, on or before such date in each year as shall be fixed by the Board of Governors, prepare and transmit to the House of Delegates, through the Board of Governors, its written report covering its work for such year and its recommendations, if any.'

"So that by the clear and unambiguous language of the Constitution, all reports of all Sections and of all Committees, while they must be and should be addressed to this House and are for the ultimate consideration and action of the House, are to come to you through the Board of Governors. That is so because you have constituted the Board of Governors a Committee of this House, a Committee to work for you, as in sessions day and night recently that body has been working for you, to clarify and to sift out things which a body of this size in a two-day session could not possibly do if it undertook to do it.

"What is the mandate of your rule with respect to reports of Sections and Committees? It is this, according to the Rules of the House—I am reading from Rule X:

"'It shall be an especial duty of the Board of Governors to exercise supervision over the work of the Sections and the Standing and Special Committees of the Association, between meetings of the Association, and to transmit to the House the annual and other reports of such Sections and Committees, together with any recommendations or comments as to such reports or as to the activities of any Section or Committee.'

"Hence, by the mandate of your Rules, my fellow delegates, the Board of Governors is a Committee of this House to examine the work of the Sections and Committees, to go over the reports of Committees, standing and special, as well as of the Sections and their Councils, and to transmit them to you, not merely as a siphon but, as a body with mental equipment may do, with the comments and recommendations of the Board, for your consideration. But you will understand that, in making recommendations, the Board of Governors as your Committee does nothing more than the original Committees do when they submit their reports. They make recommendations for *your* consideration, for *your* decision, and here lies the ultimate controlling and governing power of the American Bar Association.

"I have said already that you are here in response to a call to public duty. I have an abiding confidence that you will answer that call in a worthy manner."

Chairman Gay Takes the Gavel

Complying with what he termed "the very wise precedent" that the Chairman of the House, rather than the President of the Association, shall preside over the transaction of the business of the House, President Hogan turned over the gavel to Chairman Gay and took his seat with the District of Columbia delegation on the floor of the House. Chairman Gay referred to the printed calendar of the House as a "sufficient compliance" with the rule that the Chairman shall state to the House the business to be considered by it.

The transaction of business got under way promptly with the presentation and filing of the report of Secretary Knight, which gave an interesting review of the work of the Association, and particularly the great quantity of details handled by the Headquarters office, since the Cleveland meeting. The report of Treasurer Voorhees was deferred pending action by the Board of Governors.

Committee on Rules and Calendar Reports

Chairman Guy R. Crump of California presented the report of the House Committee on Rules and Calendar. He first referred to the resolution adopted at the Cleveland meeting that Article VIII of the Constitution, as to the present method of nominating and electing officers of the Association, be studied and reported upon by the Committee. Mr. Crump stated that "the Committee is obeying its instructions and has had hearings on that subject." He invited suggestions from members of the House and the Association. He informed the House that it is proposed to

notice for action at the San Francisco meeting of the Association, an amendment providing that a person who is a resident of a Federal Judicial Circuit at the time of his nomination from that Circuit and who is or *has been* a member of the House of Delegates, shall be eligible for election to the Board of Governors. The report of the Committee on Rules and Calendar was received without action by the House at this time.

Secretary Knight read the report of the Board of Governors to the House. It reviewed the work of the Board and reported the reelection of Charles P. Megan of Illinois to the Board of Editors of the JOURNAL, for a five-year term. The report of the Board of Governors was received, and action upon specific recommendations of the Board was deferred until appropriate times during the meeting.

Offering of Resolutions by Members

Chairman Gay announced that next in order was the offering of resolutions by members of the House. Under the Rules, a resolution offered by an individual member may be referred, by action of the House or its Chairman, for consideration in first instance by the Committee on Draft, which corresponds to the Resolutions Committee of the Assembly. The first resolution was offered by ex-Judge Robert Carey of Jersey City, New Jersey, as follows:

"Whereas, At the Cleveland Session of the House of Delegates a resolution was adopted providing for the creation of a Special Committee on Defense of Liberties Vouchsafed by the Bill of Rights; and

"Whereas, We are of the opinion that the powers of such Committee should be restricted within reasonable and proper limits;

"THEREFORE, BE IT RESOLVED, That the resolution creating said Committee and defining its powers be, and the same is hereby amended by adding thereto, the following paragraph, to wit:

"But in no event shall intervention be sought or exercised in the name of the Committee or in the name of this Association or in the name of any officer of this Association without formal action thereon and approval thereof by the Board of Governors."

The resolution was referred by the Chair to the Committee on Draft. Delegate Thomas B. Robertson of Maryland offered a resolution as to the interpretation of Section 4886 of the Revised Statutes of the United States. The resolution asked authority for intervention by the Association in the Supreme Court of the United States, in a pending patent suit. This resolution was likewise referred.

Resolutions as International Affairs are Offered

William R. Vallance of the District of Columbia, in offering several resolutions, which related chiefly to international affairs and were not read at the time, said:

"I have some resolutions that were adopted yesterday by the Council of the Section of International and Comparative Law. Unfortunately, the requirement that these recommendations or resolutions shall be adopted by the Section before they are in due course for consideration by the Board of Governors makes it necessary to submit them in this way. I think they are not of a particularly controversial nature, and in many instances they are merely carrying out previous recommendations that were made by this Section at the Cleveland meeting."

The Chairman of the House referred these resolutions to the Committee on Draft, from which they were later reported, to form the background of a spirited session.

Resolution as to Federal Judicial Salaries

Delegate Charles M. Thomson of Illinois offered, for reference to the Committee on Draft, the following resolution:

"Whereas, The Committee on Judicial Salaries of the American Bar Association considered the matter of Federal judicial salaries some months ago and concluded that, for several reasons then existing, it would not be wise to present this question to the House of Delegates or the Assembly of the Association, at that time, and

"Whereas, It is the opinion of the House of Delegates, and, we believe, the very general opinion of the members of the Bar, that the compensation being paid to our Federal judges is inadequate and should be increased;

"NOW, THEREFORE, BE IT RESOLVED, That in the opinion of the House of Delegates of the American Bar Association this matter should now have the careful consideration of the Committee of the Association, on Judicial Salaries, and that said Committee should request the appropriate Committees of the Senate and House of the Congress now in session to consider legislation making proper and adequate increases in the compensation paid to the judges of the Federal Courts and recommend the passage of such legislation by Congress."

Restrictions on Commerce Among the States

Delegate E. Paul Mason of Maryland introduced the following resolution, which was duly referred to the Committee on Draft:

"Whereas, Our membership is vitally concerned with any laws or practices which interfere with the free movement of commerce and the marketing of the products of this nation through its full length and breadth; and

"Whereas, We are duly appreciative of the value to the people of our great country and measures employed for the protection of the health and general welfare of our people; and

"Whereas, Under the guise of health and welfare measures, there has grown into existence a purpose to derive revenue from the enforcement of laws whose sole purpose is and should be to raise sufficient funds to adequately enforce health and welfare legislation; and

"Whereas, By using the health and general welfare legislation for revenue-producing purposes beyond the requirements for enforcing such legislation, an undue burden has been placed on commerce and the primary protection features of such legislation are lost;

"NOW, THEREFORE BE IT RESOLVED, That the American Bar Association, in the interest of maintaining the channels of trade and commerce free and open to legitimate business interests, condemns the use and abuse of the health and general welfare legislation for revenue producing purposes as burdensome and as a retarding factor in the economic recovery of our country."

Ashhurst Bill for an Administrative Office of the United States Courts Approved

Last Retiring President Arthur T. Vanderbilt, of New Jersey, was recognized to offer the following resolution:

"RESOLVED, That the House approve in principle the bill for an Administrative Office of the United States Courts as drafted by a committee of Senior Circuit Judges appointed by the Chief Justice and a Committee of the Bar appointed by the Attorney General;

"AND BE IT FURTHER RESOLVED, That the Special Committee on Proposals with Reference to the Federal Courts be instructed to take all proper steps in aid of the enactment of this bill."

Former President Vanderbilt moved that this resolution be made a special order of business and be considered forthwith. President Hogan seconded that

motion. The Rules permit a special order to be directed by two-thirds vote of the House. The question was put, and the motion for immediate consideration prevailed.

Mr. Vanderbilt then spoke in support of his motion to enlist the active support of the Association for the Ashurst bill to create an Administrative Office of the United States Courts, drafted by a Committee of Senior Circuit Judges appointed by the Chief Justice and a Committee of the Bar appointed by the then Attorney-General of the United States. Mr. Vanderbilt said, in part:

"I want to say a word or two as to the origin of the bill, because it is a matter of very great importance. In the two referenda that were conducted by this Association two years ago in connection with the proposals of the President of the United States with reference to the Federal Courts, the proposal for an Administrative Office of the United States Courts was supported both by the members of this Association and by the non-member lawyers of the country, by substantial majorities. Last year Attorney General Cummings prepared and had introduced into the Congress a bill to provide for the Administrative Office of the United States Courts.

"Acting under the authority of the referenda that I have just referred to, your officers appeared before Senate Committee hearings in support of that bill, and at that time made certain proposals which have been drafted into the bill to which you are now being referred. The bill did not progress in the Congress last year. At the meeting of the Conference of Senior Circuit Judges last September, Chief Justice Hughes made this subject one of the primary considerations of his address to the Senior Circuit Judges; and, as a result of the considerations which he presented to them, a Committee of Five Senior Circuit Judges was appointed by the Chief Justice to confer with the Attorney General with respect to drafting a bill to meet certain details which were the subject of consideration by the Judicial Conference. The Attorney General, in turn, appointed a Committee of five lawyers made up of Mr. Morris of the District of Columbia, Dean Arant as President of the Association of American Law Schools, Mr. Alexander Holtzoff, Mr. Gordon Dean, and myself.

"The two Committees met in joint session in Washington and, as a result of deliberations and correspondence, a bill was drafted which was submitted by the Committee of Senior Circuit Judges, first to the Chief Justice and then to all of the Senior Judges of the country. Chief Justice Groner writes that the bill as now presented has the approval of Chief Justice Hughes and has the approval of several of the Senior Circuit Judges. I have been advised, since this letter was written, that seven or eight of the Senior Circuit Judges have concurred. A forwarding letter from the Attorney-General to Senator Ashurst as Chairman of the Judiciary Committee of the Senate recites his approval and states the approval of Chief Justice Hughes. So the bill has been introduced into the Congress with the consent of the Chief Justice, the Conference of Senior Circuit Judges, and the Attorney-General representing the Department of Justice."

Provisions of the Ashhurst Bill Explained

Mr. Vanderbilt explained and discussed the provisions of the several sections of the proposed bill, which he stated "has been considered by the Board of Governors and comes here with their approval." In support of his motion to improve the bill, Mr. Vanderbilt further said:

THOMAS B. GAY
Chairman, House of Delegates

"First and foremost, the bill takes from the Department of Justice and gives over to the Courts themselves the power and the authority to conduct their own business, and so puts an end to the anomalous situation, which has existed for so many years, of the chief litigant in the Courts being the one who directs and has charge of the business affairs of the Courts.

"Secondly, I want to call your attention to the fact that the bill provides for a decentralization of authority. Instead of accumulating all authority with reference to the administration of the Courts in a central office in Washington, it provides, so far as practical, to have that authority decentralized among the eleven Circuit Courts of Appeals, with the theory and with the thought that the Circuit Court Judges will be more familiar with the needs of their circuits than anybody or any office in Washington could possibly be.

"The third thing that I think deserves particular attention is that, instead of annual reports definitely gotten up for the purpose of the meeting of the Conference of Senior Circuit Judges in September, there is substituted quarterly reports so that the judges in each circuit may know every three months exactly what is the condition of business in every one of the trial Courts of the country.

"Finally, the bill definitely provides for judicial circuit conferences to be held annually in which accredited members of the bar may be present, as they have been for many years in the conferences of the Fourth Circuit at Asheville, to the end that the members of the bar may have an official opportunity of presenting any suggestions and ideas that they may have to the judges in their circuit and, in turn, have hearing from the judges in their circuit as to measures that can be taken to best improve the administration of justice in the Federal Courts in that circuit.

"With all due regard to the bills that have been enacted in the last several years to improve the administering of the Federal Courts, I think it can be definitely said that this bill offers more promise for the public, for the litigants generally than all of the other bills combined. It is a very definite step forward to what Mr. Justice Cardozo used to refer to as 'a ministry of justice.'"

Questions as to Effects on Powers of District Judges

Ex-Governor John M. Slaton of Georgia arose to ask: "To what extent will that bill interfere with the control of the business by the District Judge who may be best acquainted with it?" Mr. Vanderbilt replied: "None at all. It merely provides that there will be this quarterly submission of the state of the dockets to the Senior Circuit Judge, and provides that at least twice a year the Circuit Judges collectively, in each Circuit, shall have a meeting to give consideration to those matters. If it develops—and this, I think, is a necessary corollary to the giving of that power—that the District Judge is not able to cope with the business in his district, that matter would have to be remedied by the judges in the circuit, making provision for assistance of that judge in his district."

In support of his answer, Mr. Vanderbilt read the provisions of Section 305 of the proposed bill, to the effect that the Senior Judge shall submit to the Council (that is, the Judicial Council, in each of the eleven circuits)—"the quarterly reports of the Director required to be filed by the provisions of Section 304, clause (2), and such action shall be taken thereon by the Council as may appear to be necessary. It shall be the duty of the District Judges promptly to carry out the directions of the Council as to the administration of the business of their respective Courts. Nothing contained in this section shall affect the provisions of existing law relating to the assignment of District Judges to serve outside of the districts for which they were respectively appointed."

There being no further discussion of the motion as to the Ashurst Bill, Mr. Vanderbilt's motion for approval in principle was adopted without opposition.

Treatment of Minorities by Other Governments

Former President William L. Ransom, of New York, offered a resolution as to the oppression of religious and racial minorities, without due process of law, in other lands. He referred to the fact that several of the largest local Bar Associations had lately adopted resolutions on the subject, and had asked that the American Bar Association bring their resolutions to the attention of State and local Bar Associations, with a request for like action. He stated that "a group of distinguished lawyers who are members of this Association cooperated in an effort to draft for your consideration a resolution which might be suitable for the purpose which they had in mind. I have the honor to present the resolution in their behalf. Nearly all of the sponsors of this resolution cooperated in its textual development."

The sponsors of the resolution were identified as Messrs. Charles C. Burlingham, formerly President of the Association of the Bar of the City of New York; Homer S. Cummings, lately Attorney-General of the United States, a member of the House of Delegates at its founding; John W. Davis, former President of the Association and former Ambassador to the Court of St. James; District Attorney Thomas E. Dewey, of New York County; President Frank J. Hogan, of the District of Columbia; former President Scott M. Loftin, of Florida; Garrett W. McEnerney, a leader of the California Bar; William D. Mitchell, formerly Attorney-General of the United States, Chairman of the Supreme Court's Advisory Committee for the new Federal Rules; Joseph A. Padway, of Wisconsin, general counsel of the American Federation of Labor; Henry L. Stimson, former Secretary of State, now President of the Association of the Bar of the City of New York; Charles H. Strong, Delegate of that local Association; and Guy A. Thompson, of Missouri, former President of the American Bar Association.

The resolution so sponsored and offered was as follows:

"As American citizens accustomed to liberty under law and as the elected representatives of much more than a majority of American lawyers, who are familiar with the history of the long struggle of mankind to secure free government and to safeguard individual rights, we express our deep regret and our strong protest that the rights of religious and racial minorities are being overridden by arbitrary power and without due process of law, in lands whose cultural background had given cause for the belief that they were friends of human freedom.

"We express our sense of dismay that human beings have been systematically persecuted and proscribed by the formal acts of the Government of the German Reich and have been arbitrarily deprived of all rights and liberties and reduced to a mere existence in utter fear and want. We note with grave concern that these things have been done for reasons which leave no safety or security for any man's religious beliefs, political opinions, racial identity, freedom of speech, or rights of property. Such a spoliation and destruction of human beings are an offense against natural right and liberty everywhere. With deep sympathy for the unfortunate victims of the wholesale disregard of human rights in Germany and other lands impelled by like national policy, we express the earnest hope that due regard for the enlightened opinion of mankind will lead those responsible to end speedily these acts of oppression and return to the humanity of justice according to law.

"We ask that a copy of this statement by the House of Delegates be sent to the Secretary of State of the United States and to each State Bar Association and each local Bar Association represented in the House of Delegates."

The proponent of the resolution did not ask for its immediate consideration, but moved that it be made a special order for the following day, at the conclusion

of the reports of Sections and Committees. This was voted.

Report on Administrative Law

The House then took up the consideration of the report of its Special Committee on Administrative Law, the importance of which had been one of the moving factors in bringing about a mid-winter meeting with adequate opportunity for such debate as had proved impracticable at mid-summer meetings. On the request of Mr. Vanderbilt, unanimous consent was given that the members of the Committee who were not members of the House be accorded the privilege of speaking, if they so desired, concerning the report. Chairman O. R. McGuire, of the District of Columbia, presented the report, with the draft of bill, and was accorded the privilege of speaking to each section separately, to the end that the members might consider each section separately. The report of the Committee, together with the proposed bill as amended by the House and as revised in minor textual respects by the Commitee after the adjournment of the meeting, are printed elsewhere in this issue of the JOURNAL.

Chairman McGuire first explained and discussed the provisions of Section 1 of the proposed bill, along the lines outlined in the Committee's report, and concluded by saying that "the section provides that the rule, once issued, will protect the citizen for thirty days, after it is declared invalid or after it is rescinded, and notice thereof is published in the Federal Register. In other words, we provide that the rules of the game shall be declared in advance of the play, that these rules shall prevail during the play. We think it will reduce the unnecessary amount of litigation, take a burden off the Courts, take a burden off the administrative departments, and take a burden off the taxpayers in the enforcement of the law."

HON. JOHN M. SLATON
State Delegate from Georgia

Stanley B. Houck, of Minnesota, Chairman of the Section on Mineral Law, was recognized; and the following took place:

"MR. HOUCK: I would like to ask several questions, if I may. In line 2, the language used is "administrative rules." Should there be included, either by definition of rule or otherwise, the question of interpretation of rules, rulings upon the rules, or general instructions issued by administrative agencies under the act or under the rules?

"MR. MCGUIRE: It is hoped that the regulations, when issued, will be in sufficient detail to enable the citizen or his attorney to know what he is doing. Of course, a rule sometimes begets another rule, and so on. But we think that that can be taken care of. The administrative department will issue a supplement or an amendment to the rule as the time goes on and they find it necessary to do so.

"MR. HOUCK: Is it your understanding that, if that is done, the provisions of Section 1 will apply to such acts?

"MR. MCGUIRE: Yes, we specifically provide that.

"MR. HOUCK: In line 12 provision is made for the administration of the statute after publication of notice, and public hearings. I notice in line 14 you provide that the rules and their amendments be published in the Federal Register. You don't provide where the publication of notice and the public hearings shall be published.

"MR. MCGUIRE: To answer that question, I will give you an example that has happened very recently. The Federal Communications Commission, dealing with one of the most complex and technical problems, I suppose, of any of the governmental agencies, is not required by statute to hold hearings preliminary to the issuance of rules and regulations. But the new Chairman of that Commission has adopted, and I think he is to be highly commended for doing so, the procedure of drawing up an agenda of information, questions that they want answered, sending them out indiscriminately over the country to people he thinks are interested, giving it to the press, trying to get the information to everybody.

"I take it that that procedure will be followed here. I do not think it is desirable, in a statute of this sort, to go into too much detail. The administrative services are anxious, most of them are, to carry out the law to the satisfaction of the citizen, and I think we can rely upon them to do their very best to get the information to us through all the known media of communication.

"MR. HOUCK: In lines 2 and 3 you refer to amendments or modifications of rules. Why did you omit rescission of the rules?

"MR. MCGUIRE: I do not think that, when the department wants to rescind the rule, they should hold a hearing upon the rescission. It is the affirmative action, the interpretation of the statute, which the citizen wants to know about. If they don't interpret it, or they find their interpretation is wrong, that the regulation is outmoded, or their experience with the service is such that they do not need that, I don't think we

should require them to hold a hearing preliminary to the rescission of a rule. That is the reason that was not put in the section.

"MR. HOUCK: On line 31 the expression is 'all amendments of such rules' and so forth; in other portions of the section I notice that the expression is 'amendments or modification' and the like. I wondered why in line 1 the word 'amendments' was used without coupling it with it 'supplements, modifications or rescission.'

"MR. MCGUIRE: That line, Mr. Houck, is found in sub-section 1 (b) of the draft which deals with the regulations that are now outstanding, the regulations which the very able Committee in the Department of Justice and from the departments are now revising. We thought that the word 'amendment' would be sufficient, if they had to make changes in that without using the other language which would apply to statutes currently enacted.

"MR. HOUCK: In lines 44 and 45 provision is made for publication in the Federal Register, of rescission, with the expression 'or final determination of the invalidity of such rule.' What is meant by 'final determination'?

"MR. MCGUIRE: 'Final judicial determination.' The reason for that definition is found in Section 2 of the bill where we take the judicial review of the regulation, and we think that it should be published in the Federal Register so that the citizen may know that the regulation has been held invalid or that the department has rescinded it.

"MR. HOUCK: Do you understand that that language provides for publication of final judicial determination of the invalidity of the rule in the Federal Register?

"MR. MCGUIRE: I think so. That is what was intended."

Judge Offutt, of Maryland, inquired "what provision of that section imposes any obligation on the agency to interpret the rules?" Mr. McGuire replied that "you can lead a horse to water but you can't make him drink." He added that "I think that these administrative agencies of the government may be relied upon, if they are given the authority, to carry out substantially what Congress expects them to do." In replying to a question from Henry I. Quinn, of the District of Columbia, Mr. McGuire stated that Section 1 contemplates as a condition precedent to the adoption and issuance of rules, publication of notice and an opportunity for public hearing. He added that "It will only be those rules and regulations which apply to hotly contested social and economic problems where we will have these hearings. The vast amount of government business will go on just as it is going on now."

Stirring Remarks by Ex-Governor Slaton

Ex-Governor John M. Slaton, of Georgia, a beloved member of the House, was greeted with applause when he arose to speak concerning the report. He said, in part: "Splendid work has been done by the American Bar Association in the organization of the Bar, and stimulation of its activities, and other achievements along procedural lines.

"However, I think the bill on Administrative Law, proposed by the Committee, deals with substantive justice and has to do with the picture and not the frame. Two years ago, at Kansas City, I spoke against the report of the Committee, but it was adopted by a vote which would have been altered by a change of two.

"On this occasion, I think the bill is superior to that which was offered before, but I wished to be recorded as expressing my views on a matter which I think is of supreme importance, not only to the Bar but to the general administration of justice.

"I am opposed to practically all bureaus, and all administrative agencies as distinguished from courts, where the ideal is to administer justice, and not to conform to some particular political, social or economic theory. Some administrative boards, like the Interstate Commerce Commission, are necessary; but one may see the tyranny that may be exerted by one of the most wisely guided Boards, if the decision of the Supreme Court of the United States, at 298 U. S. page 1, is read. I do not mention the name because I wish to engage in no personalities, but that case shows not only the temptations of these Boards, but the actual effectuation of violation of fundamental constitutional rights. * * *

"Administrative boards are appointed because of their predilections along certain lines, and we find them rendering decisions without a hearing, and contrary to the overwhelming weight of the evidence. The Supreme Court of the United States, because of the failure to observe that elemental requirement of justice, has referred the findings back for a decision after a hearing.

"The President of the American Federation of Labor has condemned that system, under which the officer or body makes rules, becomes the prosecutor, acts the part of judge and jury and of executioner.

"We have a committee of the American Bar Association dealing with the Unauthorized Practice of the Law, and were I inclined to place the argument on a lower plane, I would say that there is no instrumentality that will more deprive the real lawyer of practice than the establishment of bureaus and administrative agencies. Even in the purported bill the tendency will grow more and more to concentrate the litigation in Washington, and especially so with increased administrative agencies.

"They afford a field of work to the politician, the manipulator, and the political magnate who is influential in party councils. The only legitimate atmosphere of the lawyer is in that forum where justice is administered. I am opposed to that system that would inflict punishment simply upon an accusation made by either the Government or a powerful organization, and would create a reproduction of the Lion's Mouth in Venice, where an accusation was equivalent to conviction. * * *

"Those who advocate the multiplicity of these administrative agencies and their endowment with almost unlimited power, plead in their favor 'expertness,' which is a word of doubtful connotation; speed and judgment untrammeled by precedent. They urge that a little injustice to individuals is nothing compared with benefits arising from social instead of legal justice.

"The florid phrases employed by these gentlemen are as follows:

" 'There are those who think the Constitution is a kind of chalice like the Holy Grail suffused with ethereal light.

" 'The Constitution has become a kind of hair shirt through the wearing of which salvation could be attained.

" 'The Justices of the Supreme Court are nine old men reciting the parables of the law, and have for years offered a more fascinating study in primitive ritualism than anything the Maylasian tribes had to offer.'

"Words such as these may earn praise for a capacity of felicitous phrasing or for skill in expression

of scorn for those things for which lawyers for centuries have had reverence. I think they should not command the commendation of the members of our profession, who regard justice to the humblest individual or the strongest enterprise as the supreme achievement of a noble Government.

"I have the highest regard for the Chairman of the Committee making this report. His speeches have been to me so delightful and forceful that I have preserved them for future plagiarism. The bill his Committee has presented has eliminated many objections that have heretofore existed, but I am not in agreement with that expression in the report which voices 'an abiding faith in the intelligence and restraint of the administrative agencies.' Nor do I believe that there should further be developed in America a system of Administrative Law. On the contrary, I believe that the 130 administrative agencies could be diminished with great benefit to the public. Efficiency is not the sole object of Government, nor its highest purpose. A benevolent tyranny would be cheaper and more expeditious than the freest government that was ever created, but I believe that the Lord Chancellor of England spoke the truth in 1929, when he said:

"'Amid the cross currents and shifting sands of public life the Law is like a great Rock upon which a man may set his feet and be safe, while the inevitable inequalities in private life are not so dangerous in a country where every citizen knows that in the Law Courts, at any rate, he can get justice.'

"Justice, for the lawyer, is the Holy Grail."

Argument by Solicitor General Jackson

Solicitor General Robert H. Jackson was then recognized to speak concerning the bill. He said, in part:

"I am here in a somewhat dual position because, being a member of this body solely by virtue of connection with the Government, I assume there is some expectation that the Solicitor General would represent, to some extent, the views of the Government in the deliberations. I take it that I have a duty both to the Courts of this land, to the administrative agencies that are endeavoring to carry out the statutes entrusted to their execution and also to this body. To this body I consider it my duty to present, so that you may know in your deliberations, some of the facts which I think are frequently overlooked in connection with this matter. I am not here to urge you to take any action or to reject any action.

"There is no question that all of the administrative agencies are seriously in need of greater uniformity in procedure, and that there is a necessity for greater attention to the rights of individuals. I wouldn't disagree for a moment with the contention that we ought to seriously consider whether the rights of individuals are properly protected. I think there is need for uniformity. For example, I see very little use in a lawyer having to be admitted six or seven times in order to practice before six or seven agencies of government. I see very little use in having six or seven sets of regulations defining the same particular thing. I think there is a movement among the administrative agencies themselves to coordinate their definitions and their activities.

"Now we are between two extremes. I do not doubt that there are men who believe in administrative agencies because they want to achieve certain ends without regard to law. They want that freedom from rule, and that freedom from procedural requirements which they think they can get in administrative tribunals. And I am not one of those men. There is, on the other hand, a certain group of men who want to see administrative agencies struck down or hampered because they are the heart of modern reform legislation, and, if they can strike down the heart, they strike down the legislation.

HON. ROBERT H. JACKSON
Solicitor General of the United States

"I think it would be unfortunate if the Bar Association should align itself with that viewpoint. I think it is already somewhat in danger of being identified with that viewpoint, although I prefer to believe that most of my fellow lawyers are, like myself, somewhat in the middle of the road, recognizing that these agencies are necessary in a modern government and recognizing that vigilance is necessary to keep them in their place.

"If these administrative agencies can be dispensed with, why is it that someone hasn't discovered the formula for dispensing with them, for every administration has created them, and almost every new reform act has employed them.

Report of Association of the Bar in the City of New York Commended

"I think that this subject was under careful consideration by an eminent committee of the Association of the Bar of the City of New York, and I commend to you a reading of the report of that Committee which was dealing with the proposed Constitutional Amendment in the State of New York, which had for its object curtailing the activities and power of administrative tribunals, because it is better than anything that I have seen emanate from a Bar Association. That Committee, I think, has caught the necessity under which these tribunals labor. I want to commend here and now the

Committee that has given such thoughtful and studied attention to the subject for the American Bar Association. I don't in all respects agree with their viewpoint because I think they have, in some respects, failed to call to your attention the difficulties which the administrative tribunals face. I know there are difficulties on the part of citizens who have to deal with them. I happen to know that there are difficulties for the tribunals. In one sense, perhaps, the Solicitor General stands at the focus of the roads. We have to decide what cases we will let administrative tribunals take into Court. We review them and contest their decisions at times. At other times we support them. We also have to review decisions of lower Courts and contest them. We want to impress upon you at this time that there has been, gentlemen, no thorough study of these administrative tribunals to determine what kind of a job they are doing.

"It is a very easy thing for a lawyer, who has had an administrative case that turned out badly, to his viewpoint, to denounce all administrative agencies. Well, I have been licked in Court, but that doesn't justify denouncing all Courts. And there has been no effort to really appraise these administrative agencies' work which is certainly one of the most important in modern government. I made some effort at it, it is a feeble effort, and it begins with rather, perhaps, unsatisfactory premises.

Analysis of the Work of the Administrative Tribunals

"There is no way in which you can actually determine the work that these tribunals are doing, as to its quality, except to take the fate that it meets in actual cases in Court. We know that these administrative agencies are daily deciding thousands of cases. A grist goes through the administrative mill that the judicial department recognizes would swamp it in no time. You cannot, practically, within the framework of our government, have all of those administrative decisions reviewed. But let us take those which do come to Court. I may say that I came to the study of this subject for this reason: I saw at Cleveland the report of the Committee on Administrative Law. It was an eminent Committee, but it seemed to me that it had devoted itself too exclusively to the difficulties which are found in the administrative process, and that it had not properly set that administrative process against other methods of deciding controversies.

"The fact is that we have no ideal method of deciding controversies or of regulating other people's rights. Even the best standard that we have is to compare the work of the Courts with the work of the administrative tribunals. It seemed to me, sitting at the post where I had to review judicial decisions to determine whether to appeal or seek certiorari, and where I had to review administrative decisions for the same purpose, the Bar was coming too readily to accept the view that men in administrative posts were not doing good jobs and that men in judicial posts were.

"The fact is that there is some excellent work being done in these administrative posts. The fact is that, when they go into new fields, with inexperienced personnel, there is invariably criticism, and, after a bit of time, they solve their own problems pretty well. I heard the Chief Justice of the United States at the American Law Institute (many of you did) commend the Interstate Commerce Commission for its excellent record of impartiality and fairness. But, gentlemen, if you will go back to the days when the Interstate Commerce Commission was new, when it was dealing with a new field and struggling with inexperienced personnel, you will find that some of the most bitter decisions that were ever written by the Supreme Court on administrative law were decisions reviewing the Interstate Commerce Commission. It takes time for men to acquire the attitude and the experience. It seemed to me, when I was obliged to go into Court, not once but several times, in order to prevent courts from usurping powers which the Supreme Court sustained us in saying they didn't have, that there are two sides to this question of the work being done. I am not going to bother to read to you the qualifications on any figures because you know, as well as I, that from different tribunals you have different questions involved on appeal."

The Time of the Solicitor General Is Extended

The remarks of the Solicitor General were listened to with deep interest and at the expiration of his time, a motion for an extension of time was made by President Hogan and carried by the House. Mr. Jackson then continued.

"I am quite willing to quit. The result gentlemen, of cases that reach the Supreme Court shows that the record of administrative tribunals on review is slightly better than the record of lower Courts on review. We must admit that the decisions of the Supreme Court of the United States are our ultimate test. The administrative tribunals were affirmed in 64 per cent of their cases, and the Courts were affirmed in 54 per cent. That was a ten-year test, because I didn't want to be subject to the charge that it was simply a New Deal study. Those figures, gentlemen, are all contained in the report of the Solicitor General for the past year.

"The difficulty that we find with this bill, with this proposal, is that it seems to us to hamper unduly those bodies in their great and important work. The first difficulty is in requiring a hearing before they can promulgate a rule. I have been in positions where we had to promulgate rules. You have to decide them in response to decisions of the Court. You have to promulgate them in response to new situations which arise. Here is a provision that there must be a hearing, although it seems to be admitted that in thousands of cases no hearing is necessary or will be sought.

"Next you require that the rules be promulgated in ninety days. The net result will be a slap-dash set of rules, in many cases. The Securities and Exchange Commission has spent literally months, and running into years, studying some of its problems before it can promulgate a proper set of rules. It seems to me that we ought to encourage care rather than to put an arbitrary time limit which all administrative agencies are bound to oppose.

"The next thing that seems to me utterly impossible in this bill, from the point of view of the government, is the provision for judicial review of the rules on the complaint of anyone who doesn't like the rule. To determine questions of constitutionality, the Supreme Court has repeatedly said it will only act upon a record which shows the situation of the particular individual. If you are going to review the constitutionality of a rule in the Circuit Court of Appeals of the District of Columbia, you must adopt the practice of advisory opinions, a proposition which we have always rejected and, I think, wisely.

Some Practical Difficulties Are Pointed Out

"You can't determine the question of due process of law unless you find out how the particular rule bears

on the individual. You can't determine the question of interstate commerce unless you are prepared to try the particular situation to which it applies, and you can't pick up a set of rules and off-hand say whether they are or are not constitutional. Moreover, one of the greatest difficulties is that, if the District Court of Appeals sustains the rule and the government wins in sustaining its rule, it doesn't bind any other Circuit Court of Appeals. When you come to enforce a Trade Commission order in another circuit, or when you come to enforce an order of the Interstate Commerce Commission elsewhere than in that district, the litigant is not bound—only the government is bound. But suppose the District Court of Appeals sets aside the rule and holds it unconstitutional, I think Colonel McGuire, because he is a good lawyer, will agree with me there is no appeal to the Supreme Court of the United States because the Supreme Court will not take an abstract question; it will only determine a case or controversy.

"Now, gentlemen, we could not accept, and I don't see how the Congress of the United States could ever approve, a provision which will provide for a review of rules in a court where, if the government is licked, it has no appeal, and, if the taxpayer is licked, he isn't bound by his licking. This bill has many excellent things in it, the Committee has done an excellent job; but I would like to see you go into the fundamental question as to the usefulness, the necessity, and the kind of job the administrative tribunals are doing, and promote uniformity instead of diversity in their regulations, and make very sure that you are not hampering an agency which all men who have responsibilities of government agree we have got to use and have to live with.

"Let's not spend our time tilting against windmills." (Applause)

Remarks as to Other Parts of the Bill

President Hogan asked whether the Solicitor General, in addition to his general remarks on administrative tribunals and Section 1 of the proposed bill, had "any comments to leave with the House on the other sections, particularly with regard to the setting up of intra-agency boards, the making of the record, and the right of review by an appellate tribunal." Mr. Jackson replied:

"I don't think I will go into that at any length. Of course, the more reviews you have within the department, the more chance you have, perhaps, of having the litigant's rights considered. But it seems to me that the intra-departmental board doesn't offer the protection which you ultimately seek because it is appointed by the head of the department, and all men in office have a certain regard for the appointing power, I have noticed. (Laughter) I think what should be done is that administrative tribunals should be placed fully under the responsibility of providing their own procedure, that the ultimate order which bears on the right of the citizen should be reviewed. I have no objection to the provisions for review here, but within the department I would leave it to the department.

"Let me say, in my experience in the Bureau of Internal Revenue, there are hundreds of appeals that will be taken, just as long as there is a place to argue, without any earthly merit, and the lawyers sometimes will admit to you that the only reason they are there is that their client wanted them to make one more trip. There are other serious questions that ought to go to them, and they do set up these boards as independently as they can, to get the answer right. I think we underestimate the effort that is made in administrative bodies to do the right thing. It is very easy to say that there is bureaucracy, but that doesn't solve any problems.

"The greatest need is to place on them responsibility, to give an ultimate review of their decisions, to strive for higher types of men and better experienced men in those places." (Applause)

Chairman Gay announced that George H. Smith, of Utah, the Chairman of the Committee on Draft, had been unexpectedly detained from this meeting, and that Oscar C. Hull, of Michigan, a member of the Committee, was designated to act as its Chairman for this session, with Stuart G. Campbell, delegate of the Virginia Bar Association, named to the Committee to fill the vacancy caused by Mr. Smith's absence. Secretary Knight announced that the State Delegates would meet at 9:00 o'clock, Tuesday morning. The House then took a recess for luncheon.

Second Session—Debate on Administrative Law Committee's Report Continues—Provisions for Administrative and Judicial Review under Fire—Chairman McGuire Explains Provisions—Bill as Amended Finally Approved by Decisive Vote.

THE afternoon (second) session of the House was devoted wholly to the report and bill of the Committee on Administrative Law. Chairman McGuire continued his explanation and advocacy of the bill, section by section. The wisdom of holding a mid-winter meeting for the special consideration of this subject, apart from the congestion and many demands of a mid-summer meeting, was confirmed. The debate was worthy of any legislative body in the land. Controversy raged around the provisions for administrative and judicial review. The latter were improved in arrangement but not changed in substance. Strong opinion was manifest that the administrative review should be by an independent board rather than an intra-departmental agency. Inasmuch as existing remedies of the citizen in Court would not be taken away by the "alternate remedy," a large majority adhered to the considered report of the Committee. Motions were vigorously but unsuccessfully made to re-commit the bill, with or without instructions; the prevailing view supported the Committee's recommendations as within the limits of practicality. The determination of a majority of the House to produce a remedial bill and authorize its introduction in the Congress with Association approval was manifest at all

stages, and the final vote was decisive to that end. The bill as amended by the House and as later revised in minor textual respects by the Committee under authority granted, is printed elsewhere in this issue.

THE second session of the House of Delegates convened Monday afternoon, and continued the animated discussion of Section 1 of the bill recommended by the Special Committee on Administrative Law.

Robert F. Maguire, of Oregon, a member of the Committee who had submitted a minority report as to one provision of Section 1, was recognized to move an amendment. He proposed that for the existing ninety-day provision of Section 1 there be substituted the following:

"Rules shall be issued to implement all statutes hereafter enacted as soon as practicable after the effective date thereof."

Speaking of his amendment, Mr. Maguire declared that one of the difficulties that is found in most statutory enactments is the tendency to undue rigidity, and he believed "that the draft proposed is too rigid."

Mr. Eugene L. Garey, of New York, a member of the Committee, suggested that "it would be wiser and in the interests of a more proper consideration of this motion if there is delay until the end of the discussion on this section, before that motion is put." This suggestion was in accord with the evident wishes of the House.

Debate as to Minority Amendment

President Hogan opposed Mr. Maguire's amendment on the grounds of its indefiniteness. "If the time, ninety days, proposed by the majority of your Committee is too short," said Mr. Hogan, "it is easy, by an appropriate amendment, to enlarge it. To leave to those agencies the determination of what is 'as soon as practicable' is to use words without meaning."

Questions were asked of Mr. Quinn, of the District of Columbia, as to what, if any, time limitations were imposed as to the rules and regulations of the Internal Revenue Department. William R. Vallance, of the District of Columbia, protested what he regarded as the state of "uncertainty as to our facts." He supported the amendment by Mr. Maguire, and declared that "ninety days is too short," adding that "It therefore seems to me the wise procedure to give these officers [of the various Administrative agencies] an opportunity to consider the terms of this proposed bill."

After Mr. Maguire had closed the debate as to his amendment, the question was upon its adoption. A division of the House showed the amendment lost by a vote of 63 against 53.

Amendment Offered by Mr. Vanderbilt Adopted

Last retiring President Vanderbilt, of New Jersey, an advocate of the bill, moved an amendment to the effect that there be inserted in line 3 of Section 1, after the word "thereto," "except those relating to procedure," and that there be added to the end of Section 1, the following: "The Supreme Court of the United States is authorized and requested to prescribe uniform rules of practice and procedure for the hearing of all claims and controversies between the United States, or its governmental agencies, and its citizens, of which such agencies are vested with power and jurisdiction to hear and determine."

In support of his important amendment, which was urged by many delegates otherwise in doubt as to their attitude on the bill, Mr. Vanderbilt said:

"The underlying thought is that this section covers two distinct and absolutely separate subject matters. One is the well known power given by many Acts to an administrative agency to fill in, under standards laid down in the statute creating them, subordinate regulations, and to implement the statute, as we like to say. The other is the power to prescribe rules of procedure for the hearing of cases and controversies before these tribunals. The first power is analogous to legislation; the second power is analogous to rules of Court. Very obviously, when it comes to subordinate regulations, the subject matter of those regulations must vary as widely as the subject matter of the statutes. But when it comes to matters of the procedure to be followed in the hearing of controversies and cases before these commissions, on their judicial side, there is not that same need of a diversity of regulations and rules. On the contrary, there would seem to be no need for more complicated rules than we have in the case of actions at law and proceedings in equity in the United States District Courts.

"Therefore, if we could by appropriate action authorize the United States Supreme Court to handle, on the judicial side of these bodies which we now admit have judicial powers—we have thrown off long ago the word 'quasi'—we might get a system of procedure before these tribunals just as simple, just as comprehensive and just as effective as the rather simple rules that have been adopted for use in the United States District Courts; and, furthermore, those rules might be rather closely assimilated to the rules of hearing and procedure that exist in the Courts themselves."

He therefore moved these amendments "designed to segregate rules of procedure and rules of Court from the subordinate legislation that I think we ought properly to call regulations rather than rules."

President Hogan inquired whether Mr. Vanderbilt had consulted with Major Edgar B. Tolman regarding these amendments. Mr. Vanderbilt replied that "these amendments which I now offer were drafted by Major Tolman, who modestly declined to offer them, although I think he believes most heartily in them." Upon this statement, President Hogan in behalf of the sponsors of the bill seconded Mr. Vanderbilt's motion that the amendments to the bill be made. There was no further discussion of them, and the amendments were directed by vote, without opposition.

Discussion of Section 2 of the Bill

In behalf of the Committee, Chairman McGuire explained Section 2 of the bill, along the lines set out in the report. Assembly Delegate George Maurice Morris, of the District of Columbia, asked Chairman McGuire a series of questions designed to elucidate various provisions of the bill, as well as suggestions which had been considered but rejected by the Committee. In response to a question by John Kirkland Clark, of New York, Chairman McGuire stated his view to be that Mr. Vanderbilt's amendment of Section 1 did not affect Section 2 of the bill. Replying to a question by Judge Offutt, of Maryland, Chairman McGuire admitted that if Section 2 of the bill became law, a decision by the Court of Appeals of the District of Columbia would not be binding upon other Circuit Courts of Appeal. At the request of State Delegate Frank M. Drake, of Kentucky, Chairman McGuire commented upon sev-

eral of the contentions made by Solicitor General Jackson at the morning session.

Mr. Vallance, of the Federal Bar Association, inquired whether any estimate had been made as to the number of cases that might be carried to the Court of Appeals in the District of Columbia under the provisions of this bill. Mr. McGuire's response was that in the instances in which Congress had lately provided for and put into effect similar procedure as to certain statutes, he knew of no cases so far taken to the Court from any of the agencies affected.

Chairman Houck, of the Section of Mineral Law, proposed an amendment to Section 2 so to make the review available in the Circuit Court of Appeals of any Federal circuit, and said that "much of the activities of the Federal administrative tribunals is so remote from a great deal of the country as to practically close those tribunals to the citizens and to the attorney located in the interior. He moved the section to be amended by adding, in the third line thereof, after the words "District of Columbia," the words "and each Circuit Court of Appeals of the United States."

Chairman McGuire appealed for the defeat of the amendment in the interest of uniformity of decision. The amendment by Mr. Houck was put to a vote and was lost.

Discussion of Section 3 of the Bill

After Chairman McGuire had explained and supported Section 3 of the bill, Delegate Walter M. Bastian, of the District of Columbia, paid a hearty tribute to Chairman McGuire and the hard work done by the Committee, but he opposed the proposed creation of subordinate intra-departmental boards of three members. "If they happen to have the nerve to disagree with the head of the department, it comes back to the head of the department who can approve, disapprove or modify the action." He added that "Those of us in the District, who know governmental work, know that these men in the inter-departmental boards will be men whose very future is in the hands of their superiors." Mr. Bastian also opposed the provisions of Section 4 of the bill as to appeals from the decision of a head of a department. Mr. Bastian said, "I stand in the midground between Governor Slaton and the Solicitor General. I think that we have to have independent agencies, but I think, also, that there should be a full, complete, independent review that is made by a subordinate board of the department which makes that decision."

President Hogan took the floor to answer, from the viewpoint of his experience in the practice of law in the District of Columbia, the objection made by Mr. Bastian. He declared that "the whole point of this intra-departmental board procedure * * * is to make a public available record" of matters which "are now decided in star chamber." He declared that "to bring that procedure out into the light of day" and to assure that a "permanent available record" will be made, which the citizen can take to the Courts for review, will "have a moral, psychological effect" in the direction of fairness in the determination of administrative controversies.

Plea for Independent Boards of Review

Monte Appell, of Minnesota, spoke in opposition to review by intra-departmental boards and advocated review by boards independent of the department whose rules or practices are to be reviewed. He said in part: "I am not one of those who believe that men in government service are necessarily biased or necessarily prejudiced. I know better, because I have been there on several occasions myself. But I know that those men are pretty much a cross-section of the rest of us, subject to the same failings and the same weaknesses and the same strengths that lawyers and citizens generally have. We guard the judicial process, we guard it carefully, by giving our judges tenure of office, freedom from reduction of pay, impartiality, and a situation generally which, human nature being what it is, is inclined to result in a completely free and impartial decision. It seems to me that those essential elements in the judicial process which, through the centuries, the common law lawyers have worked out as essential to due process are equally essential to the validity of the administrative process.

"I think that anyone who has had occasion to work in this field and to study the decisions that have been rendered by our Courts, and particularly by the Supreme Court of the United States, will agree with me that the scope of judicial review of administrative action which has been allowed by the Supreme Court is in direct relationship to the impartiality and the thoroughness of the administrative hearing. In other words, if the administrative hearing is by an independent tribunal, conducted fully and freely and impartially, then the Courts are inclined to restrict the scope of judicial review. But if the administrative hearing is patently a one-sided hearing, if it is conducted by people or in a manner which indicates clearly that it lacks the judicial essential, then the Court is inclined to grant a larger measure of judicial review.

"The difficulty with this bill, and the thing that, to my mind, makes it unsound is this: That, while, on the one hand, you have an administrative hearing and an administrative determination which lacks every essential of the judicial process of independence of decision, you combine with it a narrow and restricted scope of judicial review."

After Mr. Appel had been granted additional time by the House, he concluded by saying: "It seems to me that the statute recently enacted to create the Aeronautical Authority is a very fine statute. I know personally that it was worked upon and drafted and redrafted for almost two years. I think its fineness arises primarily from the fact that the drafters of the statute recognized that the prosecutor-judge combination was a hopelessly impossible one, and that in that statute they separated administration from the exercise of the judicial function, and, because administration needs speed and decision, they put it in the hands of one man, and because the judicial function needs deliberation and discussion, they put it into the hands of three men. There you have what to my mind is the high watermark in draftsmanship, in the administrative field. I should like to see this body carefully examine that statute and undertake to determine its applicability to other fields of administrative law, before going off on the tangent which is embodied in this bill."

Bill Claimed Not to Go Far Enough

Assembly Delegate George Maurice Morris, of the District of Columbia, asked a series of further questions of Chairman McGuire concerning the provisions of the Committee's bill for intra-departmental boards. Chairman Gay ruled that questioning of the Committee Chairman could not be extended into a debate. Mr. Morris then spoke in favor of independent tribunals for review, and declared as to the Board of Tax Appeals: "Instead of a procedure in which we appeared before a board set up by the head of the agency, we were given an independent agency, with tenure of office of substantial length, substantial salaries, into which were gathered men whose business it was to interpret the laws as

distinct from their administration. The Board of Tax Appeals, as a result, has one of the finest records on appeals to the Court that any agency has ever enjoyed. * * *

"The second point I want to make is this: If you are going to have twenty boards in the Department of Agriculture, what provision is there for coordination of the findings of those boards? Are each of the findings of twenty boards to go to ten different Circuit Courts of Appeals, with the only possibility of coordination and regularization to rest upon certiorari?

"I agree with all that Mr. Hogan has said. Of course we want to make a record. Of course we want the record to be open. But why should we make it before persons whose regular job it is not to interpret but whose regular job it is to administer? That is the issue. If we are going into this thing, and going into it to put the force of the American Bar Association behind it, why don't we go all the way? Why don't we set up, between the adminstrative agency and the Courts, a body whose job it is to interpret and to coordinate? In this section of this bill, the difficulty is we haven't gone far enough."

In reply to a question by State Delegate Conrad E. Snow, of New Hampshire, Chairman McGuire again stated that the amendment adopted on motion of Mr. Vanderbilt was "perfectly consistent with the draft of the bill and, for that reason, I made no objection to it." Delegate Henry I. Quinn, of the District of Columbia, stated his intention to vote against approving the bill in its present form, and avowed that "in considering this section and all other portions of this bill, we should keep in mind the admonition of the Solicitor General, that it is a matter of such great importance that careful, sincere study should be given to every angle of this matter before we decide."

Business was suspended for a few minutes at this time, in order to permit the taking of a photograph of the session, which appears elsewhere in this issue of the JOURNAL.

Delegate Frank F. Nesbit, of the District of Columbia, said that "speaking from some experience in the District of Columbia with the procedure in these departments of the government, I think it would be most unwise for this Association, at this stage of the development of administrative law, to permanently commit the administrative agencies to a merger of procedure within the departmental agency, and to deny and to cast aside the principle of an independent body to exercise judicial functions.

"That principle remains so important that a statutory provision recommended by this Association at this time would, I think, have the most unfortunate effect on the future development of administrative law, and that is what this section does. Section 3 permanently commits all of our administrative procedure to that single intra-departmental board method."

Consideration of Section 4 of the Bill

Chairman McGuire explained briefly the provisions of Section 4 of the proposed bill, and pointed out that "the formula for the judicial review * * * gives a wider scope of review than now exists." Delegate Ernest S. Williams, of California, interrogated Chairman McGuire regarding the "judicial review" provision of Section 4 of the bill, and said that he was concerned by the juxtaposition of the clauses in that provision. "It may be a matter of concern whether or not that second clause by construction will be held to modify or limit the jurisdiction of the reviewing Court as granted by the first clause. He suggested that the provision be recast in the affirmative form so that it would read as follows: "The decision or order of any agency or independent agency shall be set aside if it is made to appear that the findings of fact are clearly erroneous, or that the findings of fact are not supported by substantial evidence." Chairman McGuire said that he saw no objection to a recasting of the review provision.

Former President Clarence E. Martin, of West Virginia, offered and moved the following amendment to the "judicial review" provision of Section 4:

"The Circuit Court of Appeals shall have the power to set aside any finding of fact made by any agency or independent agency if the court is of the opinion that the finding of facts made by any agency or independent agency is erroneous or that such finding is beyond the jurisdiction of the agency or independent agency, as the case may be, or that the decision or order infringes the Constitution or statutes of the United States, or that the decision or order is erroneous or otherwise contrary to law."

President Hogan spoke in opposition to Mr. Martin's amendment, on the ground that legislation which would provide for a hearing *de novo* on the facts and the law in the Circuit Courts of Appeals of the United States would not be likely to be enacted by the Congress, and that the House of Delegates ought to do all in its power to develop a practicable bill at this meeting, which could be presented without further delay with the approval of the House in behalf of the Association. As to the scope of judicial review of findings of fact, he said that the subject had been greatly cleared by the recent decision of the Supreme Court in the *Consolidated Edison* case. "If you adopted Mr. Martin's amendment, you would be sending to the Judiciary Committee of the Senate and House something you wouldn't get to first base on."

After Mr. Martin had closed the debate on his amendment, it was put to a vote and was lost.

Continuation of Debate as to the Bill

Consideration of Section 4 continued. Delegate John K. Clark of the New York County Lawyers Association inquired if the Committee had adopted the suggestion by Mr. Williams of California. The Chairman announced that the Committee had accepted the change, with numerals to be inserted wherever matter is stated disjunctively. Chairman McGuire explained Sections 5 and 6 of the proposed bill. Mr. Houck of Minnesota inquired whether the provision in the last paragraph of Section 1, to the effect that "the remedy herein provided shall be an alternate remedy for such remedy as may be otherwise provided by law," would leave available to a citizen the other remedies if the "alternate remedy" were first pursued. Chairman McGuire stated his opinion to be that "the Courts would undoubtedly hold that he made his election and was bound by it."

Delegate Frank H. Haskell of Maine inquired concerning the last two lines of Section 5, as to whether they meant that the individual has to pay costs to the United States in case he loses. Mr. McGuire replied that "he has to pay now," and stated that the costs are now collected from the United States, either through appropriations available for the purpose or made specifically for the purpose, upon certification to the Congress.

Chairman Gay announced that the Board of Governors had approved the Committee's bill and had recommended its approval by the House.

Efforts to Recommit or Amend the Bill

Assembly Delegate George M. Morris of the District of Columbia offered the following resolution as an

amendment by way of substitute for the motion of the Chairman of the Committee that the report and the bill be approved by the House:

"RESOLVED, That the proposed bill be recommitted with instructions to the Committee to consider the comments made in this discussion of the House and to send copies of the present draft of the bill to the heads of all governmental agencies and Courts which would be affected by the passage of the bill, and request the comments of such officers thereon.

"BE IT FURTHER RESOLVED, That the Committee be directed to submit to the House at its next meeting a digest and summary of the comments of such officers, together with the observations of the Committee with respect thereto."

Supporting his motion, Mr. Morris said, in part: "So far as I as an individual am concerned, I look with great satisfaction upon the fact that the bill, since the proposed draft was first prepared for the Kansas City meeting, has steadily progressed into a better integrated, more thought-through document. Every time that I have heard it debated and have seen it emerge from that debate, it has become ,in my opinion, a better drafted, a more sensible piece of legislation."

As reason for recommitting the bill he urged that "if the professional organization of the lawyers of this country commits itself at this juncture to the proposition that it is satisfied with the review, inside of an agency, of the administrative acts of an officer of that agency, when the time comes when we want an independent review as distinguished from a Court review, the record we make here would always be pointed to."

Plea for Action Without Further Delay

President Hogan opposed the motion to recommit, saying that "The first reason for recommitting for about the fifth time by this body to its Administrative Law Committee is that the discussion here today shows among us some difference of opinion. If that is a sound reason for recommitting the carefully studied recommendations of your subordinate bodies, then you are always going to recommit.* * *

"In spite of the fact that, as you have been informed by its Chairman, consultation has been had by your Committee with every department of the government known to have any interest in it, that it has been repeatedly placed before the Department of Justice as shown by the thorough familiarity that the Solicitor General had with it today, and that it has been submitted, in substance, to all of the Circuit Courts of Appeals of the United States, we are now asked to seek the advice of every governmental official in Washington who might want to express his opinion or advice.

"My answer to that is this: There will be hearings by the Senate and House Judiciary Committees, probably protracted hearings, on legislation of this importance, and the representatives of the various departments of the government who will differ in some respects, as the learned Solicitor General differed this morning, will have full opportunity to be heard and make their suggestions to those Committees, before the final report goes to the House and Senate.* * *

"The last point which I understand my friend, Mr. Morris, to make is that we are too much concerned with urgency. I should have thought that we were evidencing the progress of the sloth. In 1933 at Grand Rapids, the question was first brought out of the great need. In 1934 we blazed away for what the United States Supreme Court denounced in the 'hot oil case,' and we at that time prognosticated this sort of legislation as necessary. At Boston we considered the matter and we recommitted it. At Kansas City we had a bill—not as perfect as this bill; I agree with Mr. Morris that improvement has been made—we had a bill in substance such as you have here; and we, after full debate, approved it in principle and sent it to the Board of Governors with power to present to the Congress. In 1938 at Cleveland, after we heard the report of the Committee, we once again approved the bill in principle and recommitted it to the Committee, to be reconsidered by the Committee with the understanding that it was not to be presented to any Committee of the Congress until it had been passed upon in form and substance, first, by the Board of Governors who was to make its recommendation to you, and then by this House which has considered it literally, today, line by line. If that shows undue haste, if that record shows that we have sacrificed accuracy, substance, to urgency, then my teacher in English rendered me a great disservice."

Harry N. Gottlieb of Illinois supported the motion to recommit. "I know," said Mr. Gottlieb, "after a matter has been before an Association at several succeeding conventions, there is a very ardent desire to have action and to proceed. Well, some of us have been involved in matters of reforming procedure, and other efforts of improvement in the law of that kind, where we have realized we have had to have patience and work from year to year, and finally have been able to accomplish results by not showing undue haste, but by being sure that our work has been carefully prepared and conceived."

Motions to Recommit Defeated

Mr. Appel of Minnesota supported Mr. Morris' motion but submitted an amendment to it:

"That the provisions of Sections 1 and 2 of the bill recommended by the Special Committee on Administrative Law be approved in principle, and that it is the sense of the House of Delegates that review of administrative action be by tribunals independent of the agency whose action is under review, and that the report of the Special Committee on Administrative Law be recommitted to it

(Left) Hon. T. Scott Offutt, Towson, Maryland, (right) William T. McCracken, Jr., Washington, D. C.

with instruction to give further study to the subject of the independence of administrative tribunals, and to report to the next summer meeting of the House of Delegates."

Chairman Gay ruled that Mr. Appel's proposal was a substitute and not an amendment to the pending motion, and so was out of order until the House had voted on the pending amendment. Mr. Robert F. Maguire of Oregon, who had offered the first amendment voted down by the House, urged "that the bill as drawn and approved by the Board of Governors be adopted by this House. This is not an occasion for the use of anesthetics, and that is the purport of the resolution offered by Mr. Morris and the substitute resolution offered by Mr. Appel."

The question was called for on Mr. Morris' substitute resolution. A division of the House showed that it was lost, without the necessity of counting the negative votes. Mr. Appel then renewed his resolution and said that the question "is not one of delay or of action," but it is "whether the American Bar Association, through its House of Delegates, believes that administrative action should be independent of the administrator, when it is exercising the judicial function in identically the manner in which it is exercised by the United States District Courts."

A point of order by Delegate Van Buren Perry of South Dakota that Mr. Appel's motion was substantially that on which the House had already voted, was not sustained by the Chair. A division by rising vote being called for, Chairman Gay announced that "the Chair observes a great majority in the negative. The substitute resolution is lost."

Approval of the Bill as Amended

Chairman Gay then put the motion, offered by the Chairman of the Committee, that the report and the bill submitted with the report, with the amendments voted by the House, be approved by the House of Delegates. Delegate John K. Clark of New York asked, "does that motion imply necessarily power granted by this body to the Committee to submit this bill through proper legislative channels for enactment by the Congress, and does it, by implication, give them the necessary power in case it should prove that the amendments we have made during the debate today require editorial changes, to make such changes before such submission?" He suggested, as an addition to the motion, the further provision:

"BE IT FURTHER RESOLVED, That the Committee be authorized to present to the proper legislative representatives a proposed act in substantially the form hereby approved, with power to the Committee to make any verbal or editorial changes found by it to be necessary or desirable."

Mr. Clark moved this as an amendment to give further power to the Committee. The amendment was adopted, substantially without opposition.

The Chairman of the House then put the question as to the adoption of the resolution as amended. After *viva voce* vote, Chairman Gay announced that "the 'ayes' obviously have it, but a division having been called for, the Chair will order it." On a rising vote the motion was declared adopted, "as it is obvious that more than a majority of the House has voted for it."

Secretary Knight announced that the Committee on Draft would meet and hold a hearing immediately upon the adjournment of the House. All persons interested were invited to be present. On motion the House decided to hold an evening session and to adjourn until 8:00 o'clock Monday evening.

Third Session—Extended Consideration of Report by Committee on Labor, Employment and Social Security Results in Approval of Its Nine Recommendations—Law Lists Committee Makes Progress Report as to Its Work

WITH the report and bill of the Committee on Administrative Law disposed of by debate at two long sessions, the disposition of the House to "stay on the job" and give all necessary time to its important business was confirmed by the evening session Monday. Recommendations by the Section of Patent, Trade-mark and Copyright Law were approved. Extended consideration was given to a forward-looking report by the Committee on Labor, Employment and Social Security; and its nine recommendations, reported elsewhere in this issue, were adopted without change. The Association thereby aligned itself with a constructive and remedial attitude towards problems of organized labor and social security. The Committee on Law Lists made a "progress report" as to what it has "experimentally" done with this troublesome matter, and the House adopted the recommendation of the Board of Governors as to the future financing of the work as to law lists. The Committee to Defend Liberties Vouchsafed by the Bill of Rights reported, and asked the increase of its membership to twelve and the shortening of its name to "the Committee on the Bill of Rights." This was voted. The report of the lively new Section on Bar Organization Activities provoked much debate, despite the lateness of the hour. The Section asked authority for the convening of meetings, "in each State," of the members of the American Bar Association therein. Doubts were expressed as to practicability and cost, lest it mean "more meetings and less results" and "no time left to do work for clients." Regional meetings were preferred by some; but the Section recommendation was carried, upon a division. Midnight was passed before adjournment was taken.

THE third session of the House of Delegates convened Monday evening at 8:00 o'clock, with Chairman Gay presiding. The order of business was the report of the Section on Patent, Trade-Mark and Copyright Law, presented by the Chairman of the Section, Thomas E. Robertson, of Maryland. Chairman Robertson said that the Section at its meeting in Cleveland had voted to sponsor a bill providing for a suitable number of examiners and clerks as a classification force in the Patent Office, to the end that the time re-

quired for a search of existing patents, and so for an action upon application for a patent, may be greatly shortened. He moved approval of the bill.

Delegate S. Harold Shefelman of the State of Washington questioned whether "the American Bar Association ought to go on record with reference to the details of the operation of the Patent Office, any more than we do with reference to the details of the operation of any of the other administrative bodies of the government." A vote being taken upon Mr. Robertson's motion, the bill was approved.

The second resolution offered by Chairman Robertson was designed for the improvement of the situation as to so-called "patent attorneys." He said that "As many of you know, practitioners who are not members of the bar have for many years been calling themselves, in this country, patent attorneys. This Association has tried to stop that, because those who are not members should refrain from using the words 'attorney' or 'counsel.'

"At the meeting of our Section in Cleveland, we passed two resolutions. One was to request the Commissioner of Patents, if he continued to register those who practice before the Patent Office, who are not members of the bar, to put them on a special register and to compel them not to use the word 'attorney' and so on. The other was to request the Commissioner of Patents to pass a rule, which he can do with approval of the Secretary of Commerce, that after a certain time no one shall be registered to practice before the Patent Office unless he is a member of the Bar.

"As to the first one, it is not necessary for us to take any action, because the Commissioner of Patents was present at the Cleveland meeting and has already put into effect a separate register and has issued a rule whereby those registered in the future shall no longer be permitted to use the word 'attorney,' even when having before it the word 'patent.' So the first one of those resolutions is already in effect, but the second one is not.

"We want the approval of the Association to go before the Commissioner of Patents and ask him to establish a rule whereby, after a certain date, all practitioners before the Patent Office shall be members of the Bar. These patent practitioners not only prepare patent applications but they draw contracts; they take testimony; they render opinions on infringement of patents, and, in doing that, they do the work of the lawyers."

The resolution from the Section was adopted, substantially without opposition.

Report of Committee on Labor, Employment and Social Security Laws

Next was the report of the Standing Committee on Labor, Employment and Social Security, presented by its Chairman, William L. Ransom of New York. The report and recommendations of the Committee are published elsewhere in this issue of the JOURNAL; their contents were sketched briefly. Concerning the personnel of the Committee, its Chairman said that: "I am able to say to you—and I think the text of the report indicates—it has been a representative Committee, and it was deliberately appointed for the purpose of being a representative Committee. Included in its membership were those who have been and are counsel for employers, those who have been and are counsel for labor unions, both of the American Federation of Labor group and of the Congress for Industrial Organization group, and also men who have been and are identified with governmental boards having to deal with social security and with the administration of labor laws."

The first recommendation of the Committee concerned the Fair Labor Standards Act of 1938 and was unanimous. It was to the effect

"that employers, labor organizations, and lawyers for either, should cooperate in a fair trial of the labor standards prescribed by the Fair Labor Standards Act of 1938, without waiver of rights, and that suitable amendments to clarify the Act along lines consistent with its basic purposes should be drafted and acted upon by the Congress at the earliest practicable time."

On being put to a vote, the first recommendation was adopted.

Chairman Ransom then presented recommendation No. 2, to the effect

"That the recommendations of the Advisory Council on Social Security, as to changes in the Plan and provisions of the Social Security Act and the financing thereof, are approved in principle, and that specific recommendations of amendments be presented by your Committee in form for action at the July meeting of the House of Delegates."

The Chairman of the Committee added that "in respect to the approval of the recommendations of the Advisory Council in principle, your Committee is unanimous, and that includes Mr. Ekern of Wisconsin, who has been one of the foremost experts in that State, in its pioneering in social security legislation, and also includes Mr. Henry Epstein, the Solicitor General of the State of New York, whom I regard as one of the foremost American authorities in the law of this field."

Chairman Gay asked that the Secretary report to the House the action which the Board of Governors took with respect to all of the recommendations made by this Committee. Chairman Knight thereupon stated that

"The entire report of the Committee on Labor, Employment and Social Security is transmitted to the House of Delegates with the recommendation that the majority report of the Committee be approved."

Ex-Judge Harry P. Lawther of Texas asked as to whether or not Recommendation No. 2 comes within the purview of the purposes of the American Bar Association. Chairman Ransom replied by reading the Association By-Laws unanimously adopted by members of the Association, which gave a specific mandate as to the laws affecting social security, and referring to the fact that the Association and its Sections had frequently studied and reported on legislation in this field. The Chairman of the Committee added that "I can imagine no subject on which we as lawyers owe a higher duty to the American public than to use our judgment and our experience in advising an enlightened public opinion with respect to laws that are of importance to the masses of the people."

Recommendation No. 2 was then approved by vote.

Recommendation No. 3 was presented and unanimously adopted:

"That the Association urges that various departments, boards and officers having to do with labor, employment, and social security in behalf of National and State governments, should take steps whereby, as far as possible, the informational forms, data, statistics, reports, etc., required of employers under the multiplying statutes and regulations, shall be studied, reconciled, standardized, coordinated and simplified, with a view to lightening the burden and expense of 'paper work' required from employers, particularly from the smaller employers, to whom

the many duplications with minor and avoidable variances are a serious burden."

Recommendation as to "Sit-Down" Strikes

Recommendation No. 4 was stated to be the recommendation of a majority of the Committee, as follows:

"That in the opinion of the House of Delegates the forceful occupation or holding of employer property, in the form of the 'sit-down' or 'stay-in' strike, is a usurpation of property which jeopardizes the very existence of a society in which property and rights are respected, and that such occupation or holding should be outlawed as an unfair labor practice by labor organizations and by employees, under the National Labor Relations Act, and the State Labor Relations Acts."

Chairman Ransom said, for the Committee:

"With respect to that recommendation, I shall read what the two minority members say: In the first place, my good friend Clif Langsdale of Kansas City, who was President of the Kansas City Bar Association three years ago and was to have been Chairman of the committee for our entertainment in Kansas City two years ago. Mr. Langsdale is trial counsel for both the A. F. of L. and the C. I. O. unions, latterly a little more of the C. I. O., I suspect." Mr. Langsdale's "separate statement" on this subject was as follows:

"I believe that 'sit-down' or 'stay-in' strikes are illegal. I agree with everything that the preliminary report says about them. In addition to that condemnation, I believe that they have done more harm to the labor movement in America than all other agencies combined, in that they have aroused a large percentage of public opinion against all labor union activities. But I am doubtful of the advisability of the necessity of amending the National Labor Relations Act to prohibit such strikes."

The "separate statement" by Herman L. Ekern of Wisconsin was to the effect that:

"The sit-down strike is an unlawful deprivation of property to be condemned and dealt with through appropriate legal remedies aided by developing a public sentiment that insists upon respect for the law."

Recommendation No. 4 was adopted by a vote of the House.

Other Recommendations by the Committee Adopted

Recommendation No. 5 was:

"That the Association is of the opinion that although the employees of National, State and local governments may rightfully organize, whether independently or in affiliation with National groups of labor organizations, so long as they do so solely for the collective presentation and discussion of grievances, recommendations, etc., no organization of government employees should be recognized for any purpose or given any standing under any statute or regulation, unless such organization shall expressly in its Constitution renounce and bar the weapon of the strike as a means of coercing government and thereby attaining its aims."

Mr. Ekern of the Committee thought that it was unwise to make such a regulation or requirement as to the outlawing of strikes by government employees seeking to coerce the government, inasmuch as the National Labor Relations Act does not in its present form apply to governmental employees. Recommendation No. 5 was approved.

The Chairman of the Committee explained some of the considerations which were believed to have led to the present form of the National Labor Relations Act; he also stated considerations which were believed to warrant present amendments to that Act, along lines consistent with its basic purposes. Recommendation No. 6 was as follows:

"That the National Labor Relations Act should now be amended so as specifically to give to employers the right to petition for an employees' election to choose their collective bargaining representative, in situations where no 'company union' is found by the Board to be involved."

Mr. Langsdale stated that "I am in favor of such an amendment." Mr. Ekern raised the question whether the stage as yet had been reached where amendments to the National Labor Relations Act should be considered, although he did not specifically argue against this particular amendment.

Board of Governors: (left to right) Henry S. Ballard, Louis E. Wyn T. Vanderbilt, Edgar B. Tolman, John H. Voorhees, Thomas B. Gay, (not a member of the Board), George L. Buist, Joseph D. Stecher, William Carl B. Rix, and Thomas J. Guthrie

Delegate Murray Seasongood of Ohio stated that "I don't see any reason why the employer should not be allowed to ask for an election in the case of a company union.* * * I think, as long as you give only the right to petition, with discretion in the Board to grant the petition or not, most of us who have had any experience with that find (perhaps I am unjust in that) that the Labor Board does not grant the petition where they don't think the particular union they want to succeed is likely to succeed.

"I have a great deal of respect for the considered report of this Committee. Instead of making a motion to amend to strike out all the words "in situations

where no 'company union' is found by the Board to be involved," I should prefer to ask Judge Ransom to show cause why such an amendment should not be offered."

The distinctions between "company unions," "company-dominated unions," and independent local labor organizations free of employer interference, were explained by the Chairman of the Committee, who moved that Mr. Seasongood be allowed to speak again upon the question. When this was carried, Mr. Seasongood moved that in recommendation No. 6 the words "in

E. Wyman, Joseph W. Henderson, Robert Stone, Arthur B. Gay, Harry S. Knight, Frank J. Hogan, O. R. McGuire William G. McLaren, David A. Simmons, Walter S. Fenton,

situations where no 'company union' is found by the Board to be involved" be eliminated. Chairman Ransom urged that "if we desire to obtain an amendment of the National Labor Relations Act to make the Act and the Board a two-way street, I state very earnestly to you my strong belief and the belief of your Committee that it will not be done unless it is coupled with a restriction which excludes the employer's right to petition where the employer is maintaining a union which he has instigated and is controlling and financing."

Mr. Seasongood then changed his amendment so that instead of striking out the clause specified in his motion, he would leave it as it is, but would insert the word "dominated" between the words "company" and "union." After discussion by Mr. Rhinehart E. Rouer of Texas, the amendment was put to a vote and was lost. The Recommendation No. 6 was then adopted by a vote of the House.

Prohibiting "Unfair Practices" by Employees

Recommendation No. 7, with which Messrs. Langsdale and Ekern of the Committee were not in agreement, was—

"That the Association is of the opinion that the National Labor Relations Act should be amended now so as to define and forbid as unfair and illegal certain specific and clearly defined practices by labor organizations and groups of workers, including both practices directed against employers and against free choice by individual workers; and that such amendments should clarify the Act and clearly specify what practices are to be deemed coercion, interference, intimidation, domination, etc., by employers and by labor organizations, and should not merely forbid coercion, etc., 'from any source'."

On being put to a vote, Recommendation No. 7 was adopted.

Recommendation No. 8, "from the viewpoint of the public interest in industrial peace and in stability of industrial relationship, as well as in the proper interests of employees," was stated to deal "with a situation which is one of the most acute which arises in the industrial scene today." This recommendation dealt with minority strikes, picketing, etc., after a majority organization of employees had won an election, and was—

"That the Association is of the opinion that the National Labor Relations Act should be amended now as as to provide that after an election or a certification of a majority bargaining agency, no minority strike, picketing, or boycott should be tolerated and so as to provide that any labor organization resorting to such weapons should be denied recognition and standing for a definite period in the plant or industry, under the Act."

As to this recommendation Mr. Langsdale said:

"I believe that an amendment which would go no farther than to deny a labor organization standing under the Act for such conduct would be helpful and fair. Mr. Ekern's view was said to be substantially that previously stated.

Recommendation No. 8, "in behalf of the principle of majority rule in industry" was put to a vote and was adopted.

Recommendation No. 9 was one upon which the Committee was unanimous, to the effect:

"That consideration should be given by the respective States to the enactment of State Labor Relations Acts, in such form as to give effect to the amendments proposed in this report as to the National Act."

Recommendation No. 9 was approved by vote of the House, and the presentation of the report was concluded.

Report as to Law Lists

Ex-Judge Frank E. Atwood of Missouri, Chairman of the Special Committee on Law Lists, made its report. Secretary Knight announced that the report had been transmitted by the Board of Governors to the House of Delegates with the recommendation that the report be approved. The report of the Committee was substantially as outlined by Chairman Atwood in the January issue of the JOURNAL (pages 13-17). He went into detail as to the amounts appropriated by the Board of Governors for the expenses of the Committee, and also gave information as to the expenditures thus far incurred. He continued by saying:

"But under the provision which requires the Committee to do this investigation of law lists at the ex-

pense of the applicants, your Committee proceeded to make collection from the Lists that applied at an estimated amount which was $500 per List, and the subsequent events have shown that that wasn't far wrong as an estimate of the reasonable expenditures during that period of investigation, the primary or initial investigation preceding approval.

"Your Committee was in doubt as to whether or not its powers already conferred would authorize any further requirement of expenses from Law Lists that had been approved for the purpose of keeping them investigated and approved during the current year. You understand the recent approval is for the edition of 1939. It is conceivable that a List already approved might, in some supplement, put itself in condition or position where its approval should be revoked.

"Consequently, during the remainder of this Association year, and if the Committee should be continued in the succeeding years, that matter of constant supervision and of some degree, at least, will have to be pursued."

After Chairman Atwood had moved the approval of the report, Sidney Teiser of Oregon asked whether the Secretary of the Committee would be continued under the new order and whether that expense would be continued. Judge Atwood replied: "That expense will go on through the remainder of the Association year. This is a mid-winter report." Mr. Teiser inquired: "Who is going to pay the expense of the Secretary if continued?" Judge Atwood replied, "I think you will be enlightened when you hear the recommendation that accompanies this from the Board of Governors."

Delegate Joseph F. O'Connell of Massachusetts said he had "thought up to the time that this report came in that he was a member in good standing in this organization." He evoked laughter and cheers by declaring that the "situation so far as I am concerned is this: I am in the Law List of the Incorporated Society of Ireland." After referring to this as a law list that is used in the Courts of Ireland, both in the South and North, and carries the names of many reputable American firms, most of the members of which are members of this Association, Mr. O'Connell noted "that on the foreign list approved by the Committee there are ten Canadian, six English, two Scottish and no Irish lists." He asked whether the Law List of the Incorporated Society of Ireland had been considered by the Committee. Judge Atwood replied that the Committee "did not conceive as its duty to go out and solicit applications. We considered those that we received." The list mentioned by Mr. O'Connell was not among those which filed applications. The motion to approve the Committee's report was put to a vote and carried.

With respect to the financing of further work of the Committee, the following resolution was submitted by Secretary Knight in behalf of the Board of Governors, which recommended that the resolution be adopted by the House:

"RESOLVED, That the Special Committee on Law Lists be authorized, empowered and directed further to investigate, as may be necessary in the enforcement of rules and standards, at the expense of the applicant, all applications for approval that have been granted or hereafter may be investigated for approval, and that the general expense of the Committee, as such, be borne by the Association in an amount to be appropriated by the Budget Committee."

President Hogan seconded the motion to adopt the resolution, and the same was carried.

Committee on the Bill of Rights

Grenville Clark of New York, Chairman of the Special Committee created at the Cleveland meeting, presented its report and moved its recommendations. These were to the effect that the formidable name of the Committee be changed to "Committee on the Bill of Rights," and that the membership of the Committee be increased from nine to twelve, the resolution adopted by the House in Cleveland on July 29, 1938, to remain unchanged in other respects. The motion in behalf of the Committee was put to a vote and carried. The following thereupon took place:

WALTER S. RUFF, of Ohio: "May I ask the gentleman a question? By what authority and at whose suggestion did the Committee intervene in the Jersey City case and file a brief which was sent to the various members of the House of Delegates? By what authority did the Committee do that?"

MR. CLARK: "As to the authority, the answer is contained in the resolution of July 29. As to the question upon whose suggestion the action was taken, the answer is, the action was taken on the initiative of the Committee and upon nobody else's suggestion."

Report as to Bar Organization Activities

Chairman R. Allan Stephens of Illinois, in behalf of the Section of Bar Organization Activities, presented its report, which related in the first instance to the rules to govern "an award of merit to that State Bar Association which has performed during the then current year, the most outstanding and constructive work, and a like award to the local Bar Association which has done the most outstanding and constructive work in its field; such awards to be made under rules approved by the House of Delegates or by the Board of Governors, and to be without monetary value, but the making thereof to be publicized in the AMERICAN BAR ASSOCIATION JOURNAL and the Journal of the American Judicature Society." The proposed rules having been approved by the Board of Governors, Chairman Stephens did not ask for action on them by the House.

Chairman Stephens then referred to the resolution offered by Mr. Teiser of Oregon at the Assembly sessions in Cleveland and referred by the Assembly, in accordance with the recommendation of its Resolutions Committee, to the Section of Bar Organization Activities. The resolution was—

"RESOLVED, That the American Bar Association recommend that wherever feasible, there be called and held in each of the States one or more meetings a year of the members of this Association in such States, at which shall be discussed some activity or activities of this Association.

"THAT the State Delegates from each of the States be requested to call and to hold under his supervision such meetings, and

"THAT such meetings be held without cost to the Association."

The Chairman of the Section referred to the regional and other meetings which had experimentally been held, and moved the adoption of Mr. Teiser's resolution. State Delegate Sylvester C. Smith, Jr., of New Jersey commended the work which the Section on Bar Organization Activities is doing but questioned whether the resolution should be adopted, calling for such meetings in "each of the States," lest "the multiplicity of meetings will some time mean that lawyers have no time to take care of the work of their clients. * * * As one State Delegate, I wouldn't think it feasible or advisable." He preferred that the Section continued its present system of conducting regional meetings in connection with State Bar Association meetings.

He was fearful of "just adding more meetings and getting less results."

Charles M. Thomson, of Illinois, joined in the doubt and opposition expressed by Mr. Smith. Mr. Teiser of Oregon supported the resolution and declared that experience had shown that such meetings are practical in many States. The hour was midnight, and some members of the House had left the hall. The resolution being put to a vote, it was declared to be carried, upon a division of the House.

Chairman Stephens, at the suggestion of Chairman Gay, moved that the Chairman of the Section shall appoint the five judges to make the awards to State and local Bar associations. The motion was adopted, and the House thereupon adjourned until Tuesday morning.

Fourth Session—Expeditious Procedure for Approving Draft of the Bills by Commissioners on Uniform State Laws Adopted—Program for Obtaining Facts As to Economic Condition of Bar Approved—Debate on Resolutions Touching International Affairs, Etc.

THE fourth and concluding session of the mid-winter meeting showed no abatement of interest and participation by able newcomers to the floor of the House. Good progress was made in clearing the calendars of Section and Committee reports which otherwise would have been held for consideration in San Francisco. An expeditious procedure for future handling and approval of bills drafted by the National Conference of Commissioners on Uniform State Laws was adopted, to the satisfaction of all concerned. A program for obtaining the facts as to the economic condition of the Bar was approved, as was the drafting of a bill to provide for increased salaries for judges of the United States Courts. The resolution as to the treatment of religious and racial minorities abroad was withdrawn, because of doubt as to the scope of the present authority and duty of the House as to international relations. A resolution as to the expropriation of oil properties by the Mexican government was referred back to the Section of International and Comparative Law, after debate; and other resolutions dealing largely with international affairs were withdrawn by the Chairman of that Section. The question as to the province of the House in that field was not answered, but was left for later consideration. Discussion recurred as to the Association's intervention in the Jersey City litigation. The House concluded its business and adjourned soon after noon, with a prevalent feeling that the meeting had been worth while and had taken important action in behalf of the public and the profession. Because of the business transacted, calendars will be less congested in San Francisco.

THE fourth session of the mid-winter meeting of the House of Delegates convened at 10:00 o'clock on Tuesday morning, January tenth, with Chairman Gay presiding.

First was the report of the National Conference of Commissioners on Uniform State Laws, of which Alexander Armstrong of Maryland is President. Secretary Knight first reported to the House concerning the status of several proposed Uniform Acts which the House at the Cleveland meeting referred to the Board of Governors for action. The report of the Board stated that—

"Pursuant to the resolutions adopted by the House at its Cleveland meeting, the several acts submitted by the National Conference of Commissioners on Uniform State Laws to the A. B. A. for approval, have been considered by a sub-committee of the Board, and the following action has been taken by the Board, in accordance with the recommendation of its subcommittee:

"The Uniform Property Act, the Uniform Estate Act, have been approved by the Board's subcommittee and by the Board of Governors in the form submitted by the National Conference; and the Uniform Unauthorized Insurance Act, as amended by the Conference in accordance with suggestions of the Board of Governors, has been approved by the Board of Governors; and the Board of Governors recommends the approval of these Acts by the House of Delegates.

"The Uniform Common Trust Fund Act has been approved and should be included with those just read.

"With relation to the Uniform Absence as Evidence of Death and Absentee's Property Act, this has been referred by the Board of Governors and its Committee back to the National Conference for further study and report."

It was announced that the proposed Aviation Act had been withdrawn for the time being by the National Conference. On motion by Mr. Teiser of Oregon, the Acts recommended by the Board of Governors were unanimously approved by the House in behalf of the Association.

Procedure as to Proposed Uniform Laws

Secretary Knight announced further that, pursuant to a request from the House of Delegates at the Cleveland meeting, which asked the Board for suggestions as to the manner in which the reports received from the National Conference should hereafter be handled, the Board had approved and recommended the following resolution for the consideration of the House:

"RESOLVED, That the Board of Governors recommends to the House of Delegates that all proposed Acts prepared by the Commissioners on Uniform State Laws be presented by the Commissioners direct to the Board of Governors for its consideration and by it, the Board of Governors, transmitted to the House of Delegates with the recommendation of the Board of Governors."

After Secretary Knight had moved the adoption of the resolution, Mr. Armstrong was invited to speak concerning the work of the National Conference and the resolution reported by the Board for granting the approval of the Association to proposed Uniform Acts without unnecessary delay. Mr. Armstrong stated he and the Committee of the National Conference believe that the plan which had been proposed to the House in the pending resolution "will be a satisfactory solution." The resolution was put to a vote and was adopted.

Recommendations as to Municipal Law

Henry P. Chandler of Illinois, Chairman of the Section of Municipal Law, presented its report with recommendations developed by Section Committees. Mr. Chandler said that, in view of the questions and strong objections which had been brought forward as to such a measure, the Section did not at this time ask for action by the House upon a proposed amendment to the Federal Judicial Code regulating proceedings in behalf of judgment creditors against municipalities to enforce their judgments, in the nature of proceedings by mandamus. Mr. Chandler submitted a request of the Section of Municipal Law that the proposed bill be made the subject of a forum discussion in connection with the 1939 Annual Meeting, under the joint auspices of the Section of Municipal Law, the Section of Judicial Administration, and the Standing Committee on Jurisprudence and Law Reform. The Board of Governors transmitted this recommendation with the comment that "there is no objection to an open forum" to be arranged among the Sections and Committees involved.

A further recommendation by the Section, relating to special assessments against real property, etc., was to the effect that, in substance, the part of the present Federal Bankruptcy Act "relating to the adjustment of debts of taxing districts be amended to permit, likewise in the same manner, subject to the same restrictions, that such a petition can be presented only by the municipality; that the action must be authorized by state law; that any plan of composition before it is submitted by a municipality must be approved by the holders of fifty-one per cent in amount of the obligation: that, before the plan is confirmed by the court, it shall be approved by the holders of sixty-six and two-thirds per cent in amount of the obligation. But the proposal of the Committee is that this provision be broadened to permit the adjustment of special assessments of bonds and securities on precisely the same terms."

Chairman Chandler stated that this proposal "has been submitted to a good many persons. I have heard of no objection other than the objection of those who are opposed to any municipal bankruptcy law." He read a letter from Congressman Walter Chandler, of Tennessee, who is Vice-Chairman of the Section, from which he quoted *verbatim*:

> "I believe that it is advisable for the Municipal Law Section to undertake the passage of the proposed amendment to the Bankruptcy Act for the purpose of composing special assessment obligations, and I will be very glad to assist the Section in that respect."

The motion was made that the House approve the recommendation of the Section of Municipal Law, as expressed in the bill to amend Sections 81, 82, and 83 of Chapter IX of the Bankruptcy Act, and that the Section be authorized to urge its adoption before the Congress. Murray Seasongood of Ohio raised the question whether the Section reports should not have been considered by some Committee of the House, and was informed that, pursuant of the Rules, the recommendation of the Section had been considered and passed on by the Board of Governors as the Committee of the House for the purpose.

President Henry A. Kiker of the State Bar of New Mexico discussed the proposed bill and said, in part:

"I cannot understand (I do not rise to impart information but to get it, if I can) how it is and why it is that this Association should undertake to make it possible for a municipality, so circumstanced as I have just mentioned, to invoke the aid of a Court of bankruptcy. If the bonds are all on a parity, then the underlying security, the liens upon the real estate, is available to all bondholders alike. If the bonds are payable in numerical order, and that is the established law in my State, then those who had the prudence and the foresight to buy lowest numbered bonds enjoy the security. In order that they may have that which they bought, I think there should not be legislation which will undertake to interfere with their rights in underlying security."

S. Harold Shefelman of Washington said that "As I understand the Act, it would not destroy the matter of the right to prior payment in those States in which, under the decisions or statutes of those States, the early-numbered bonds are entitled to prior payment, and I call upon Mr. Chandler to verify my interpretation of this Act." Mr. Chandler replied "That would be my interpretation, except of course by consent, where a plan is agreed to by the holders of two-thirds of the obligation. If the holders of prior liens want, for the sake of agreement, to make some concession, they have the right to do it, but you are quite right, the act, unless those liens were waived, would not affect them."

The recommendation of the Section was put to a vote and was adopted.

Economic Condition of the Bar

William A. Roberts, of the District of Columbia, Chairman of the special Committee on Economic Condition of the Bar, presented its significant and timely report by saying, in part:

"I am sorry to take your minds from the exalted plane of international law and great questions of substantive law, but our Committee is designed to study the rather important question of the pocketbook of the lawyer, the question of his income and the question of means and methods by which that income shall be increased, or can be increased, at the same time preserving the present or higher standards of service to the public.

"At the convention in Cleveland, our initial work was concluded. A manual, a rather elaborate document—which I might say was so heavy that some seventy delegates found it impossible to carry it from the convention hall—was distributed. That was in the nature of an encyclopedia of facts on the income of the lawyers; and it does include suggestions of a general nature for improvement of the gross income of the lawyer and for reduction of his cost and expenses. The report revealed the deplorable condition, economic condition, of great numbers, particularly of younger lawyers, in large cities, and contained a wealth of com-

parative information as to means by which this condition could be alleviated.

"We found, however, that the report was so exhaustive, particularly in a statistical way, and that the recommendations were so general and confined to the views, usually, of a few students of individual questions, that our first function under the powers then conferred on the Committee could not be fulfilled. Our first function was, in substance, to see that State Bar Associations, local Bar Associations, and Junior Bar Associations and Conferences, made inquiry into this study of the economic condition of the Bar and recommended and proposed in their own jurisdictions actions which would correct the unfortunate economic condition. Apparently the State Associations could not work from the manual.

"The second thing about the manual was that it was so expensive that it was impossible to produce it in sufficient quantities to distribute it generally to the Bar. The third thing which we encountered was that our recommendations in almost all instances touched on the activities and powers of existing Committees of the Association and Sections.

"The proposal which we have is that the Committee on the Economic Condition of the Bar be permitted to consult with a group of Sections of the Association and Committees of the Association and urge each Committee, in its own sphere, to make a study of its own work, directed particularly toward improving the economic condition of the Bar and our service to the public; that this work be compiled from the several Committees and Sections, and a very much less expensive and more concise document be prepared. We are not asking, of course, for the publication of that document at this time. We are asking for authority from the House of Delegates and the Board of Governors to approach these Committees and Sections and to consolidate their efforts toward the general problem of improvement of the economic condition of the Bar."

Resolution for Fact-finding Adopted

The recommendation of the Committee was that the following resolution be adopted:

"RESOLVED, That the Committee on the Economic Condition of the Bar be authorized to confer and cooperate with the agencies of the Association hereinafter set forth toward the end that there may be prepared for submission to the Association at the annual meeting a coordinated, condensed statement of the proposals of such agencies, each in its own field, toward the improvement of the economic condition of the Bar. Provided: That the approval of this recommendation shall not be construed to affect or diminish the jurisdiction of any such agency as at present established.

The Section of Commercial Law
The Committee on Jurisprudence and Law Reform
The Committee on Legal Aid Work
The Committee on Unauthorized Practice of the Law
The Special Committee on Law Lists
The Special Committee on Legal Clinics
The Special Committee to Consider and Report as to the Duplication of Law Books and Publications
The Section on Bar Association Activities and Its Committees on Publications, Fees and Schedules of Charges, Program and Public Relations
The Section of Judicial Administration
The Junior Bar Conference
The Section on Legal Education and Admission to the Bar."

Secretary Knight reported that the resolution of the Committee was transmitted by the Board of Governors to the House with the recommendation that it be adopted. That action was unanimously taken.

Consideration of Resolutions Offered by Members

Under the special order voted by the House, Chairman Gay recognized Mr. Ransom of New York concerning the resolution which he offered in behalf of a group of sponsors at the first session of the House. Mr. Ransom said that—

"I think that all of you realize that I am one who believes that the consensus of opinion which is developed in this body, through the conferences and discussions which take place as well as the debates on the floor, is a very reliable judgment. The resolution which I offered yesterday in behalf of a distinguished group of sponsors, along the lines of resolutions which had been requested by two of the largest local Bar Associations, has been very carefully considered by most of you.

"In my judgment, there is a substantial difference of opinion, not as to the sentiments of the resolution but as to the scope of what the House as now constituted should do in the name of the organized Bar with respect to questions of international relations. Under those circumstances, with your permission and without the consent of the sponsors but with the consent of the Association of the Bar whose delegate is here, the Association where this resolution originated, I ask your leave to withdraw the resolution at this time."

On motion of Arthur G. Powell of Georgia, permission for the withdrawal of the motion at this time was granted by the House.

On motion of Chairman R. G. Storey of the Section of Legal Education and Admissions to the Bar, final approval was voted to the University of Kansas City School of Law and to the University of Buffalo School of Law, both of which had been unanimously approved by the Council of the Section of Legal Education. Provisional approval, by probation for a period of two years, was likewise voted to the Ohio Northern University College of Law and the University of Toledo College of Law, of Ohio. Chairman Storey presented a brief report as to the work of the Section and its Council since the Cleveland meeting.

Rules for Uniform Criminal Procedure

Chairman J. J. Robinson, of Indiana, in behalf of the Section of Criminal Law, offered the following:

"RESOLVED, That the American Bar Association recommends that Congress enact a statute to give the Supreme Court of the United States authority to prescribe for the Courts of the United States rules of pleading, practice and procedure with respect to proceedings in criminal cases prior to verdict."

Chairman Robinson stated that President Hogan last September asked him "to concentrate the activities of the Section upon this proposal," which has the endorsement of the officers and members of the Council of the Section, and also of former Attorneys-General Homer S. Cummings and William D. Mitchell.

Sylvester C. Smith, Jr., of New Jersey, asked questions as to bills attached to the report of the Section. The question was upon the adoption of the resolution introduced in behalf of the Section of Criminal Law. The motion to adopt the resolution was carried, and consideration of the attached bills was deferred.

Report of the Committee on Draft

Ex-Judge Thomson of Illinois, Chairman of the Committee on Hearings, reported that no occasion had arisen for a hearing before his Committee. Acting-Chairman Oscar C. Hull of Michigan, in behalf of the Committee on Draft, gave an interesting discussion

of several suggestions for improving the handling and consideration of resolutions introduced by individual members of the House. He then presented the report of the Committee as to the several resolutions introduced at the first session.

Resolution No. 1 was that of Ex-Judge Thomson of Chicago (set out in the report of the first session) relating to increasing the salaries of Federal judges. The resolution was adopted.

Resolution No. 2, by Delegate E. Paul Mason of Maryland (set out in the report of the first session), with reference to restrictions upon trade between the States, elicited a recommendation from the Committee that the resolution be referred to an appropriate Section or Committee for consideration. Upon the motion of Sylvester C. Smith, Jr., of New Jersey, the resolution was referred to the Committee on Commerce.

Debate as to the Brief in the Jersey City Case

Resolution No. 3, by Robert Carey of New Jersey, as to the Special Committee on the Bill of Rights, was printed in the account of the first session of the House. The Committee on Draft recommended that "the House Delegates at this time should not further consider the resolution." Mr. Carey discussed his resolution, which proposed to amend the resolution adopted by the House at its closing session in Cleveland last July. He declared that "I am personally against the American Bar, directly or indirectly, lending its aid to any litigant in any private litigation. No excuse can justify it. The Cleveland resolution doesn't justify it.* * * This Committee was appointed at Cleveland. Of course, it began to look for work. There is plenty of work for a Committee of this character in the bar, without going into the courthouse with the litigant. Then, what happened? It looked around for something big, apparently. It looked across the river from New York into the State of New Jersey.

"We had a civil rights battle pending there for some months; for six months the battle had been pending in the Courts in our State, before this Committee was appointed. Questions were raised by great organizations, most of them too radical even to describe, saying that they had been refused their civil rights in the State of New Jersey. The battle got into the Courts. The testimony was taken, seven weeks of it. Not a voice or a peep from this Bar or any other Bar on the subject. Then the decision came down in that Court, and an appeal was taken from the United States District Court, by one of the litigants, to the United States Circuit Court of Appeals."

State Bar Association Delegate Roy E. Willy of South Dakota rose to a point of order that the resolution before the House was merely a restatement of Article XI of the By-Laws of the Association. Chairman Gay sustained the point of order that the resolution was out of order because "No action by resolution could change the By-Laws." On appeal by Mr. Carey, the point of order and the ruling of the chair were sustained.

Intervention in a Patent Suit Authorized

Resolution No. 4, by Thomas E. Robertson, Chairman of the Section of Patent, Trademark and Copyright Law, was as follows:

"WHEREAS, There is divergence between the U. S. Patent Office and some of the Federal Courts in the interpretation of Sec. 4886 of the Revised Statutes as to the right of a foreign inventor to get the benefit of work done outside of the United States in connection with his invention, the Patent Office recognizing only the foreign inventor's date of application for patent, whereas many of the Federal Courts, on questions of priority of invention, recognize all acts of the foreign inventor in connection with the making of the invention abroad, and give to such acts the same force as if done in the United States; and

"WHEREAS, Under the patent laws of all foreign countries, an American citizen has no greater rights than those accorded to foreign inventors by the U. S. Patent Office; and

"WHEREAS, A Committee of the Section of Patent, Trade Mark and Copyright Law, after thorough study

Rules and Calendar Committee: (left to right) Chauncey E. Wheeler, Providence, R. I.; Sylvester C. Smith, Jr., Newark, N. J.; Guy Richards Crump, Chairman, Los Angeles, Calif.; Philip J. Wickser, Buffalo, N. Y.; and George Maurice Morris, Washington, D. C.

of this matter, recommended to the Section at the Kansas City Meeting, in 1937 that Sec. 4886 of the Revised Statutes be amended as follows:

"'In all proceedings in the Patent Office and in the Courts of the United States, an applicant for a patent, or patentee, shall not be permitted to establish his date of invention or discovery by reference to knowledge or use thereof, or other activity with respect thereto, in a country foreign to the United States, other than the filing in a foreign country of an application for a patent for the same invention or discovery, which, in accordance with the provisions of Section 4887 of the Revised Statutes, is entitled to have the same force and effect as it would have had if filed in this country on the date on which it was filed in such foreign country.'

and,

"WHEREAS, The Section on Patent, Trade Mark and Copyright Law adopted at its Kansas City Meeting the foregoing recommendation of its committee; and

"WHEREAS, There is now pending in the Supreme Court of the United States a case entitled *The Electric Storage Battery Co. vs. Genzo Shimadzu et al*, No. 441 of the October term, 1938, which will probably be heard early in March, 1939, and in which there is squarely present this question as to the proper interpretation of Sec. 4886; and

"WHEREAS, If the Supreme Court, in said case adopts the same interpretation of said Sec. 4886 as the U. S. Patent Office there will be no need for amending said section, as recommended by the Patent Section at Kansas City and the principle of the recommendation effectuated.

"NOW, BE IT RESOLVED, That the Council of the Section on Patent, Trade Mark and Copyright Law be authorized to appoint a committee to petition the Supreme Court for permission to intervene in said case No. 441 and file a brief, as friend of the Court, such brief to be restricted to the single question of law above referred to and the principle embodied in said proposed amendment to Sec. 4886 as approved by the Patent Section."

Mr. Robertson briefly discussed his resolution and its preamble. They were approved by vote.

Resolutions as to International Relations Referred or Withdrawn

Resolutions No. 5 by William R. Vallance, Chairman of the Section of International and Comparative Law, were seven in number, and Mr. Vallance was recognized for the presentation of his resolutions. Mr. Vallance stated that the number of the resolutions "is due to the fact that, at a meeting of section Chairmen in Chicago, October 15, 1938, the recommendation was made that as much business as possible be disposed of at the Chicago meeting, in order to reduce the quantity of business for the San Francisco meeting next July." The first resolution moved by Mr. Vallance was that—

"IT IS HEREBY RESOLVED by the House of Delegates of the American Bar Association that, apart from any question as to the soundness of the claims of the American owners of oil properties, if the Mexican government should prove unwilling to restore to those owners properties which have been expropriated, or to make prompt and adequate compensation therefor, the broad question as to the existing duty of the expropriator to the United States, and more specifically to those of its citizens who are such owners, should be submitted to an international tribunal for appropriate adjudication."

In response to a question by Henry S. Ballard of Ohio, Chairman Vallance explained that it had been impractical to have a meeting of the section but that the resolution had been approved by the Council of the Section. Mr. Ballard declared that: "In view of the fact that this resolution applies to the field of international law and international relations at this time and is a matter of extreme delicacy, it seems to me that, before this House of Delegates should pass upon a matter of this importance, the Section itself should have this matter under consideration and give it careful consideration, and then at the next meeting of the House of Delegates report its recommendations, so that we may know what the opinion is of the Section as a whole."

Mr. Ballard raised also the question whether the resolution was within the scope and authority of the Section as defined in Article I, Section 2, of its By-Laws, which read that—

"The purpose of this Section shall be to promote the objects of the American Bar Association within the particular fields designated by the name of the Section and, to that end, to promote interest, activity and research in the two fields of international and comparative law; to diffuse knowledge thereof among members of the legal profession and formulate professional opinion thereon."

Mr. Ballard offered, as a substitute for the resolution of Mr. Vallance, that it be referred to the Section of International and Comparative Law, with instructions to consider it and report to the House at the next meeting.

In opposing the motion to refer it to the Section, Chairman Vallance said of his resolution that "It is not something that should be left over until next July. The properties of these companies have been taken, and they are unable to get a tribunal. This will help them to get the tribunal. That is the sole purpose of this, to express the view of this Association that such a tribunal should be provided."

President Hogan supported Mr. Ballard's motion. "I have the greatest admiration," he said, "for the Chairman of the Section of International and Comparative Law for the excellent work which he and his Council are constantly doing. But you are asked today to establish a precedent of the utmost importance..* * * The resolutions themselves are exceedingly voluminous. Every one of them (I address myself now to this as an example) deals with highly delicate questions of international law. Nobody, certainly nobody in this House, I am sure, will accuse me of lacking sympathy with oil companies owning properties in Mexico or elsewhere. But I recognize no urgency that should require the setting aside of the regular and orderly procedure of the American Bar Association, its Committees and its Sections and its House at this time, for the benefit of oil companies or anyone else."

L. Ward Bannister, of Colorado said that: "Although I have not had any experience in the oil fields of Mexico and cannot speak with authority for that reason, yet without that experience I venture to support Mr. Ballard's resolution that this matter be referred to the Section. It is difficult to find any reasons, in addition to those given by President Hogan, but there is one that occurs to me. This being an international question, it seems to me that the Secretary of State might well be consulted before this body takes action. There have of late been too many people venturing to speak for the Department of State; some of them did it recently in Mexico."

In closing the debate Mr. Vallance disclaimed any desire to evade or avoid legal procedure and said that "he will abide by the wishes of the members of the House most willingly." The motion to refer the resolution to the Section on International and Comparative Law was thereupon adopted, and Mr. Vallance withdrew his other resolutions as to international affairs.

Delegate Ruff of Ohio said that he was under the impression that the Chairman of the Committee on Bill

(*Continued on page* 163)

JACOB M. LASHLY, ST. LOUIS, MO.

OSMER C. FITTS, LUDLOW, VT. DOUGLAS ARANT, BIRMINGHAM, ALA., GRENVILLE CLARK, NEW YORK CITY, ROSS L. MALONE, JR. ROSWELL, N.M., BURTON MUSSER SALT LAKE CITY, UTAH.

ROBERT CAREY, JERSEY CITY, N.J., O.R. McGUIRE, ARLINGTON, VA., JULIUS C. SMITH, GREENSBORO, N.C.

SYLVESTER C. SMITH, JR., PHILLIPSBURG, N.J., HENRY S. KNIGHT, SUNBURY, PENNSYLVANIA

WILLIAM L. RANSOM, NEW YORK CITY, HENRY P. CHANDLER, CHICAGO, ILL., EDGAR B. TOLMAN, CHICAGO, ARTHUR T. VANDERBILT, NEWARK, N.J., MURRAY P. SEASONGOOD, CINCINNATI, O.

CANDID CAMERA SHOTS AT MEETING OF HOUSE OF DELEGATES IN CHICAGO

REPORT OF ADMINISTRATIVE LAW COMMITTEE AND DRAFT OF PROPOSED BILL

Basic Purposes of the Draft Bill Submitted as Appendix to Report Explained—These Objectives Cover Generally Formulation of Regulations, Review of Application by Subordinates of Such Regulations and Statutes, and Judicial Review of Administrative Conclusions by a Uniform Procedure Applicable Alike to Boards within the Agency and So-Called Independent Agencies—Reasons for Various Provisions Stated, etc.

THE draft of bill submitted as an appendix to this report has three basic purposes—(1) the improvement of methods of formulating rules, the exercise of quasi-legislative functions (including provisions for judicial review of rules so formulated), (2) the establishment of a system of administrative review (through administrative boards) within single-headed governmental agencies, and (3) provisions for judicial review of the decisions or orders of such administrative boards. In connection with each of these three objectives, it is sought to standardize the methods and machinery; and the three objectives cover, generally three consecutive stages of the administrative process —that is, the formulation of regulations, the administrative review of the application by subordinates of such regulations and the statutes, and, finally, judicial review of the administrative conclusions by a uniform procedure applicable alike to the intra-agency boards and to the so-called independent boards.

While the reasons are stated at length in the annotations to each section of the draft of bill attached as an appendix, they may be summarized, that:

1. Section 1 requires every Federal administrative agency to implement, by rules and regulations, statutes administered or enforced by it. All rules, except in public emergencies, which may be changed, amended, or supplemented *ad infinitum*, must be adopted after public notice and public hearing, must be published in the Federal Register, and may not become effective until so published. A reconsideration of existing rules must be granted when requested and any changes therein or supplements thereto must be *after* public notice and public hearing.

[*Editor's Note*: We publish a summary, with many substantial excerpts, of the Report of the Special Committee on Administrative Law, which was submitted to the House of Delegates at its meeting in Chicago on January 9, 1939. We publish in full the bill drafted by the Committee, submitted by it to the House, and approved and recommended by the House of Delegates after a day's debate narrated elsewhere in this issue of the Journal. The text of the bill as now printed gives effect to the amendments voted by the House of Delegates and also various minor revisions in draftsmanship, made by the Committee by virtue of the authority granted by the House at the time its approval of the bill was voted. A copy of the Committee's report in full may be obtained by any member of the Association, on written request to the Association Headquarters, 1140 North Dearborn Street, Chicago, Illinois. Non-members may secure copies, at twenty-five cents each, on like request to Association Headquarters.]

2. Section 2 provides that any subsequent rule or any existing rule which is not modified upon request may be judicially reviewed in the United States Court of Appeals for the District of Columbia, with the limitation that no rule may be held invalid except for conflict with the Constitution or statutes of the United States or except if adopted without the public hearing or reconsideration provided therefor.

3. Administration of the law by interpretative rules—when there is a method of judicial review thereof as provided in Section 2 of the draft—is incomparably better and more expeditious to definition by administrative decision, because the latter method of judicial inclusion and exclusive does not permit of a sustained, consistent, comprehensive and speedy disposition of public business or control over subordinates. Also, the latter case by case method takes years to cover a narrow field; it leaves wide lacunae; false starts are difficult to correct and an erroneous decision is just as prolific as a sound decision in begetting a progeny of subordinate rules.

4. There is no basis in fact for the suggestion that Section 1 would place business in a "straight-jacket". The flexibility of the rule making power is preserved to the end that the rules may be changed or supplemented at any time but only after public notice and public hearing—unless there should be a public emergency stated in a rule approved by the President of the United States—and subject, in any event, to judicial review in the United States Court of Appeals for the District of Columbia.

5. Judicial review of a regulation, involving the merits of a claim or controversy, is preserved.

6. Section 3 of the draft provides for the recognition of intra-agency boards now operating under regulations or statutes, authorizes the creation of additional similar boards, fixes the number of their members at three, provides, that such boards shall give a full and fair hearing, that they shall have the necessary power to subpoena witnesses and documents, hear examination and cross-examination of witnesses, and generally that there shall be a record of proceedings as in a trial court. Also, that these boards shall make written findings of facts and decisions or orders but flexibility is retained by the requirement that such procedure shall not be followed except when demanded by the private party. In order to prevent conflicts among the several intra-agency boards, the draft provides for review of decisions by the head of the agency concerned or his representative but without provision for appeal by the agency from the decision of its own board. Appeal is limited to the private party.

7. Section 3 further provides for a standardized

and uniform procedure before the independent boards and commissions, such as the National Labor Relations Board, for instance.

8. Section 4 of the draft provides a uniform method of judicial review by the United States Circuit Courts of Appeal or if otherwise within its jurisdiction, by the United States Court of Claims. It has been sought to authorize judicial review of the record evidence to see whether the findings of fact are not clearly erroneous and are supported by *substantial* evidence but it has not been sought to make such review of the evidence mandatory on the courts.

9. Section 4 also provides that in the event a reviewing court should disagree with a prior decision of another reviewing court, the points of disagreement shall be promptly certified by the disagreeing court to the Supreme Court of the United States, accompanied by a statement of the reasons for such disagreement, and subsequent proceedings are in the Supreme Court in accordance with the procedure established by law for certified questions.

10. Section 5 of the draft provides for taxing of cost to the losing party and carries forward the provisions of existing law for the assessment of damages should the court conclude that appeal was merely for purposes of delay.

11. Section 6 of the draft provides for the continuance of existing judicial remedies if any, and for the exemption of certain governmental agencies from the terms of the bill.

With the foregoing summarized statement of reasons, which appear more at length in the annotations to the several sections of the draft, it seems desirable to restate certain fundamentals and to summarize the history of this proposal. While our country was young, natural resources more abundant, and population sparse there was little need for governmental regulation and control. This need has gradually developed within approximately the past half-century and more particularly within the past two decades. The late Elihu Root in his Presidential Address in 1916 to the American Bar Association saw that the problem, though not then acute, was upon us and declared that the underlying cause of the "great economic waste in the administration of the law viewed from the standpoint of the nation and of the state" and the "unnecessary expenditure of wealth and of effective working power, in the performance of this particular function of organized society"—with one county, for instance, in a great western state of our Union possessing more judges than the whole of England—is "that the Bar and the people generally proceed upon a false assumption as to their true relation to judicial proceedings" in that "we all treat the business of administering justice as something to be done for private benefit instead of treating it primarily as something to be done for the public service." * * *

Writing in his preface to *The Spirit of the Common Law*, Roscoe Pound, last year's chairman of this Committee, stated a number of years ago that:

"The real danger to administration of justice according to law is in timid resistance to rational improvement and obstinate persistence in legal paths which have become impossible in the heterogeneous, urban, industrial America of today. Such things have been driving us fast to an administrative justice through boards and commissions, with loosely defined powers, unlimited discretion and inadequate judicial restraints, which is at variance with the genius of our legal and political institutions."

Many similar statements could be quoted from eminent legal authorities in public administration but this report is not intended to be a treatise on administrative law and its development in accordance with the genius of our legal and political institutions based upon the principle of equal and exact justice to all and special favors to none. And administrative law must be developed, as suggested by Mr. Root, and to develop administrative law, there must be machinery of government therefor. Administrative law is not something existing in the abstract nor is it a special creation of some political god. It is forged in the white heat of conflict between the need and desire for stability in governmental institutions and the need and desire for changes to meet the needs of a people in a complex economic and social world. Such conflicts and changes have taken place in the fields of private law, as was learnedly stated by Dean Pound in his address in 1924 to the American Bar Association, entitled "Some Parallels from Legal History" (49 A. B. A. Repts. 204, 223) and in his Cambridge Lectures, entitled *Interpretations of Legal History*. The growth in governmental administration to which Mr. Root called attention in 1916, has been accelerated in recent years and the end is not yet.

As stated in our 1938 report, "administrative law" for us means law in the lawyer's sense and involves:

"(1) the place of the administrative process in the legal order, and particularly its relation to constitutional checks and balances and the legal doctrine of the supremacy of the law; (2) the body of authoritative grounds of and guides to the administrative process; and (3) the administrative process in its relation to these grounds of and guides to its operation—how far and how they govern, how far they ought to govern, how far they ought to govern if they may be made to govern effectively."

The 1937 draft of administrative law bill which this Committee submitted to the Kansas City Convention; which was changed in some particulars and submitted to the Board of Governors for its approval at the May, 1938, meeting and which it did approve; which was *supported* in the 1938 report of this Committee to the Cleveland meeting of the Association; and which this Committee submits herewith with a few changes is summarized in the first and second paragraphs of this report. It should be clear that each of the three objectives is interdependent one with another and that the three form a rounded whole to the end that "these agencies of regulation may themselves be regulated," to use Mr. Root's phrase; to provide the machinery of government for the development of administrative law; and to canalize administrative discretion in the administration of the law within banks to prevent such discretion from overflowing; that is, to prevent administrative absolutism through the incorporation of the Roman Law concept of administrative absolutism, contrary to the genius of our legal and political institutions.

The draft is not concerned with the *policy* of the substantive law administered by the agencies of the Federal government but it is concerned with the *procedure* of administering such laws. As Professor Frankfurter eloquently urged at the Cincinnati Conference on Functions and Procedure of Administrative Tribunals (22 A. B. A. Journal, 282, 286):

"Remember, there are very precious values of civilization which ultimately, to a large extent, are procedural in their nature. . . . All tribunals, administrative, or judicial, have to enquire and examine before they decide.

Historic experience lies behind the right to a day in court, and a full day. Those who decide should record their judgments and give reasons for them, which in itself will have a fruittul psychological effect. You feel much more responsible—all of us do—if we have to sit down and write out why we think what we think."

The draft of bill, attached with annotations as a part of this report, is in accordance with the genius of our legal and political institutions; it observes the precious values of our civilization by requiring the administrative agencies to grant a day, and a full day to the aggrieved citizen before making a decision or order, on administrative appeal, and requires that the reasons in support of any order must be stated in writing; and it canalizes administrative discretion both as to quasi-legislative and quasi-judicial duties, within constitutional and statutory limitations through the establishment of a standardized method of judicial review in our traditional courts, with the courts having sufficient jurisdiction in such cases to see that the limitations have been respected. In other respects, administrative discretion remains free, as it must be, if a complex government is to function.

The draft also provides the machinery for the development of administrative law in the lawyer's sense through the use of the traditional methods and technique in the joining of old materials found in the law, more or less reshaped, to new materials found outside the law; by analogical development of the old materials, by extension here and restriction there; by generalization; and by cautious striking out to meet modern needs on new paths, paved, in part, at least, with old and proven materials. * * *

[The report then reviews extensively the history of the subject in the American Bar Association, as shown by the reports made and the actions taken from year to year.]

By way of summary, this draft in its three basic purposes or objectives, is based on the conviction of a majority of four of the members of the 1937 Committee, which originated it, and the unanimous convictions of the members of the 1938 and 1939 Committees that the suggestion of some persons to the effect that judicial review of administrative decisions should be limited to questions of law only (if by "law" is intended to mean the interpretation of the statute, as seems to be the case), is alien to our traditions of government and free institutions; that such suggestions come to us through certain continental countries now under the rule of dictators—who either personally or through their controlled subordinates exercise legislative, executive, and judicial power practically in their entirety; and that the adoption of such a suggestion in this country could but result here, in time, in a similar condition of administrative absolutism.

On the other hand, it is equally our conviction that both practically and constitutionally the Legislative, Executive, and Judicial branches of our government have certain duties to perform and that none of these branches may assume, or be given, the duties and powers of the others so long as our present Constitution survives. None of these branches may be subjected to the review of either or both of the others so long as the duties and powers of each are exercised within the limits of the Constitution and the statutes in conformity therewith. Among the rights, liberties, and privileges of the people of the United States in administration of law are the requirements that there shall be a day, and a full day if required, of fair hearing by an impartial official; that the decision when rendered, or order when entered shall be based on the law and the facts and not on the whim or caprice of the deciding official; and that such decision or order shall be formulated in writing in conformity with traditional use of legal materials.

Further, it is our conviction that, in order to assure observance of the constitutional rights and privileges of our people, there must—in event of complaint—be such check by an independent branch of the government, the Judiciary, over the administration of the law, as will result in an independent determination of whether or not the statute is being administered in accordance with legal standards set up in the law to prevent administrative discretion from exceeding the limitations stated in the statutes being administered, upon which the complaint has arisen that there has been infringed the rights, liberties or privileges of the complainant. This does not mean the substitution of judicial discretion for administrative discretion exercised within the terms of constitutional statutes, upon the basis of facts honestly, impartially and correctly applied.

We are fully conscious—as were apparently the 1937 and 1938 Committees before us—that we have rejected all suggestions that we recommend the establishment of administrative absolutism, by limiting independent review to questions of statutory interpretation, on the one hand, and all suggestions on the other hand that we futilely attempt to stifle the inevitable growth of administrative law by the substitution of a judicial procedure so inflexible—either in the form of a further series of independent agencies or in the form of more trial courts—that it would not only bog down administration by mandatory trials *de novo* or mandatory review on the facts but which would be impossible of attainment.

We have an abiding faith in the intelligence and restraint of the courts as well as of the administrative agencies. We believe that if given a reasonable and practicable procedure--such as we have proposed—they will be able, in the Anglo-American legal tradition, to develop in America a system of administrative law. So believing, we submit the appended draft with our recommendation that it be approved as the American Bar Association Bill in the interest of all the people for whom this government was ordained and established.

We conclude this report with a statement by James Madison, Father of the Constitution, that:

"In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed and in the next place oblige it to control itself."

Respectfully,

O. R. MCGUIRE, *Chairman*,
WALTER F. DODD,
EUGENE L. GAREY,
JULIUS C. SMITH.

SEPARATE REPORT OF ROBERT F. MAGUIRE*

While I am heartily in accord with the main provisions of the proposed bill, I object and dissent to the provision in Section 1 that rules necessary to implement future statutes shall be promulgated within ninety days after the effective date of such statute. Administrative rules are given the force of law because in many instances it is impossible for Congress, by statute,

*After Mr. Maguire's motion to amend the bill had been defeated, he supported heartily the motion to approve the bill.

to do more than declare a legislative policy, leaving to the executive branch the duty of filling in details as present or changing conditions may require. Whether we like it or not, Governmental regulation tends always to broaden in scope and application to the affairs of the citizen. It is better to have no rules than hasty, ill considered ones. A new statute may set up a new agency to deal with new problems. The administrators selected to carry out that statute, theoretically and practically must inform themselves of the problem. This means research and study and requires time. To compel the agency to issue rules and regulations before this has been done, is to invite uncertainty, impracticality, injustice to the public, and may defeat the very purpose of the statute. I most earnestly recommend that lines 19 to 23 of the draft be amended to read as follows:

"Rules shall be issued to implement all statutes hereafter enacted as soon as practicable after the effective date thereof."

ROBERT F. MAGUIRE.

PROPOSED ADMINISTRATIVE LAW BILL—S. 915

To provide for the more expeditious settlement of disputes with the United States and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, that:

SECTION 1. *Implementing administrative rules*—(a) Hereafter all administrative rules and amendments or modifications thereof, or supplements thereto, except those relating to hearing procedure, and all amendments or modifications or supplements of existing rules (which shall include regulations), implementing or filling in the details of any statute affecting the rights of persons or property shall be issued by the head of the agency (which as used in this act shall mean departments and independent establishments) and by each independent agency (which as used in this act shall include boards, commissions, authorities and other organizations) charged with the administration of the statute after publication of notice and public hearings; and all such rules and amendments shall be published in the Federal Register within ten days (Sundays and national holidays excluded) after the date of their approval by the head of the agency or the independent agency concerned and shall not become effective until such publication, except in a public emergency stated in the rule approved by the President. Rules under all statutes hereafter enacted, shall be issued as herein provided within ninety days after the date same become law subject to the adoption thereafter of further rules or amendment of rules, or rescission of rules from time to time as provided in this Act.

(b) Any person affected by an administrative rule in force on the date of the approval of this act may petition the head of the agency or the independent agency which administers any statute under which the rule was issued for a reconsideration of any such rule; and the head of such agency or the independent agency shall, after publication of notice and public hearing, determine whether such rule shall be continued in force, modified, or rescinded. All amendments of such rules shall be in accordance with the procedure provided in subsection (a) of this Section and all action of the head of such agency or the independent agency on such petitions and all new or amended rules shall be published in the Federal Register as prescribed in said subsection (a) for the publication of rules and amendments.

(c) No person shall be penalized or subjected to any forfeiture or prosecuted for any act done or omitted to be done in good faith in conformity with a rule or amendment which has been rescinded or declared invalid by any final judgment entered as hereinafter provided, unless the act was done or omitted to be done more than thirty days (Sundays and national holidays excluded) after the publication in the Federal Register of the rescission or final judicial determination of the invalidity of such rule.

(d) The Supreme Court of the United States is authorized and requested to prescribe uniform rules of practice and procedure for the hearing of all claims and controversies between the United States or its governmental agencies and any person, of which said agencies are vested with power and jurisdiction to hear and determine.

SECTION 2. *Judicial Review of Rules.*—In addition to the jurisdiction heretofore conferred upon the United States Court of Appeals for the District of Columbia, that court shall have jurisdiction, upon petition filed in accordance with its rules, within thirty days (Sundays and national holidays excluded) from the date any administrative rule is published in the Federal Register, to hear and determine whether any such rule issued or continued in force in accordance with Section 1 of this Act is in conflict with the Constitution of the United States or the statute under which issued. No rule shall be held invalid except for violation of the Constitution or for conflict with a statute or for lack of authority conferred upon the agency issuing it by the statute or statutes pursuant to which it was issued or for failure to comply with Section 1 of this Act. A copy of the petition, and copies of all subsequent pleadings shall be served upon the Attorney General of the United States who shall conduct the defense of the rule. The court may refer such petition and any reply thereto for the taking of such evidence as shall be material and relevant thereto. The court shall give preference to such petitions and shall have no power in the proceedings except to render a declaratory judgment holding such rule legal and valid or holding it contrary to law and invalid. If the rule is held contrary to law and invalid, the rule thereafter shall not have any force or effect except to confer immunity as provided in Section 1 of this Act. Nothing contained in this Section shall prevent the determination of the validity or invalidity of any rule which may

[EDITOR'S NOTE: Herewith is printed the bill recommended by the Committee on Administrative Law, as amended in several respects by the House of Delegates and subsequently revised by the Committee. The text as now given carries in the amendments to Section 1, drawn by Major Tolman, offered by Mr. Vanderbilt, and adopted by the House. It also gives effect to the rearrangement of the "judicial review" provision in Section 4(b), suggested by Mr. Williams of California. The present text also contains minor editorial changes, made by the Committee, after the adjournment of the House of Delegates, under the authority of the amendment offered by Mr. J. K. Clark of New York, as to the final resolution of approval as adopted. Each provision of the proposed bill has been carefully and extensively annotated by the Committee. These valuable annotations are contained in the pamphlet report, of which any member of the Association may obtain a copy on written request to Association Headquarters. Non-members may obtain copies, on like request, at twenty-five cents per copy.]

be involved in any suit or review of an administrative decision or order in any court of the United States as now or hereafter authorized by law.

SECTION 3. *Statutory Approval and Authority for Administrative Boards and Prescribing their Procedure* —(a) Every head of an agency (as defined in Section 1 of this Act) shall from time to time designate three employees of his agency for such intra-agency boards (including the field service of such agency) as may be necessary and desirable. Where there are intra-agency boards existing on the date of approval of this Act, they shall be re-established and function in accordance with this Act. Wherever practicable, such boards shall be designated in various sections of the United States. At least one employee designated for each such board shall be a lawyer who shall act as chairman of the board. When the members of any board are not engaged in the hearing of administrative appeals as hereinafter provided, such employees shall be assigned to other duties in the service of the agency concerned. No member of a board who has participated in a particular case or in the preparation, draft or approval of any rule shall sit in review or appeal of the case or application of the rule. Each board shall be impartial, free and independent in the hearing and determination of administrative appeals.

(b) When any person (which term wherever used in this Act shall include individuals, corporations, partnerships, or other organizations) is aggrieved by a decision, act or failure to act (which shall include any regulatory order) by any officer or employee of any agency, such person may notify the head of the agency in writing of objections thereto, specifically requesting that the claim or controversy be referred to a board constituted as hereinbefore provided for hearing and determination. Such notice shall be given not more than twenty days after the date of receipt of a registered letter notifying him of the decision, act, or failure to act. Such written objections shall be referred promptly to an intra-agency board for the agency concerned. At a time and place to be designated and communicated to the aggrieved person, he shall have an opportunity at an early day for a full and fair hearing before said board, at which time there shall be introduced into the record the testimony and any documents or objects relating to the administrative appeal before said board. Any person having a substantial interest in the controversy shall have the right to intervene therein. A stenographer shall be assigned to the hearings before the board to take and transcribe the testimony. All testimony, other evidence and all proceedings before the board shall be reduced to a written record and filed in the agency concerned and a copy thereof shall be furnished to the aggrieved person upon his written request therefore at a charge not exceeding fifteen cents a folio. Within thirty days (Sundays and national holidays excluded) after the day the evidence and arguments are closed, the board shall make written findings of facts and separate decision or order thereon, which shall be subject to the written approval, disapproval, or modification of the head of the agency concerned or of such person as he shall designate in writing to act for him. A copy of the findings of fact and decision or order, showing the action if any, of the head of the agency concerned or his representative, shall be filed in the agency as a part of the written record in the case and a copy shall be sent by registered mail to the aggrieved person and to the intervenors if any. The United States shall take such action as may now or hereafter be provided by law to enforce the decision or order of the agency unless there be pending judicial review thereof as hereinafter provided.

(c) The chairman of any board, upon request of any party to the proceedings, shall require by subpoena the attendance and testimony of witnesses and the production of documents and all other objects before said board without other showing than required by the rules in United States District Courts for the issuance of subpoenas by such courts. Any witness subpoenaed or whose deposition is taken shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party at whose instance the witness appears or deposition is taken. In the event of disobedience of a subpoena issued as herein provided, the chairman, or any party to the proceedings may apply to any district court of the United States of the jurisdiction in which the witness may be found for an order requiring his attendance and testimony and the production of all documents and objects described in the subpoena. The chairman of the board shall be authorized to administer oaths to witnesses and there shall be a right of examination and cross-examination of witnesses.

(d) When the matter in controversy is such that the delay incident to the hearing and decision of the case would create an emergency contrary to the public interest and there is administrative action or inaction, prior to or without such hearing and determination, resulting in the destruction of the property or damage to the aggrieved person involved in such controversy, the findings of fact and decision when made by the board shall state the amount of pecuniary damage suffered by the aggrieved person and upon approval thereof by the head of the agency concerned, the amount of damages so approved, if acceptable to the aggrieved person, shall be certified to the Congress for an appropriation with which to pay the same.

(e) Where any matter arises out of the activities of any independent agency (as defined in Section 1 of this Act), it may be provided by rule that such matter may be heard in the first instance by one of its trial examiners, who shall file with the independent agency his written findings of fact and separate decision or order thereon, which shall be made in all instances, whether by the examiner or the independent agency, after reasonable public notice and a full and fair hearing as hereinbefore in this Section provided. A copy or copies thereof shall be sent by registered mail to the aggrieved party. The independent agency may enter at the expiration of thirty days (Sundays and national holidays excluded) such appropriate decision or order as may be proper unless within said thirty days (Sundays and national holidays excluded) the aggrieved party shall file by registered mail with the independent agency his written objections to the findings of fact and decision or order of the examiner in which event the independent agency shall not enter its decision or order without first according a public hearing upon reasonable notice to such party. Such hearing shall be before the members of the independent agency, if it has not less than three members, or before any three of such members. If the independent agency has less than three members, an intra-agency board shall be constituted in the manner provided in subsection (a) of this Section, upon which the member or members of such agency may serve at his or their election.

SECTION 4. *Judicial Review of Decisions or Orders of Administrative Agencies.* (a) The term

"Circuit Court of Appeals" as hereinafter used shall include the United States Court of Appeals for the District of Columbia.

(b) Any party to a proceeding before any agency or independent agency as provided in Section 3 of this Act who may be aggrieved by the final decision or order of any agency, or independent agency, as the case may be, within thirty days (Sundays and national holidays excluded) after the date of receipt by registered mail of a copy thereof, may at his election file a written petition (1) with the clerk of the United States Court of Appeals for the District of Columbia; or (2) with the clerk of the Circuit Court of Appeals within whose jurisdiction such aggrieved party resides or maintains his principal place of business or in which the controversy arose, for review of the decision or order. Before filing a petition such party may within ten days make a motion to the agency or independent agency concerned for a rehearing tendering a statement of any further showing to be made thereon which shall constitute a part of the record, and the time for appeal shall run from the order on such motion if denied or the order made on such rehearing if a rehearing shall be had. The petition shall state the alleged errors in the decision or order of the agency or independent agency concerned. The Attorney General of the United States and the agency or independent agency shall each be served by registered mail with a copy of the petition and it shall be the duty of the Attorney General of the United States to cause appearance to be entered on behalf of the United States within thirty days (Sundays and national holidays excluded) after the date of receipt by him of a copy of the petition and it shall be the duty of the agency or independent agency, as the case may be, within thirty days (Sundays and national holidays excluded) or such longer time as the court may by order direct, after receipt of a copy of the petition to cause to be prepared and filed with the clerk of such court the original or a full and accurate transcript of the entire record in such proceeding before such agency or independent agency. The court may affirm or set aside the decision or order or may direct the agency or independent agency concerned to modify its decision or order. Any case may be remanded to the agency or independent agency to take such further evidence as in the discretion of the court may be required but no objection not urged before the agency or independent agency, as the case may be, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused by the court for good cause shown. To facilitate the hearing of such appeals and avoid delay in the hearing of other matters before the court, such court may constitute special sessions thereof to consist of any three judges competent in law to sit as judges of a Circuit Court of Appeals, which special sessions may be held concurrently with the regular sessions of said court. Any decision or order of any agency or independent agency shall be set aside if it is made to appear (1) that the findings of fact are clearly erroneous, or (2) that the findings of fact are not supported by substantial evidence, or (3) that the decision or order is not supported by the findings of fact, or (4) that the decision or order was issued without due notice and a reasonable opportunity having been afforded the aggrieved party for a full and fair hearing, or (5) that the decision or order is beyond the jurisdiction of the agency or independent agency, as the case may be, or (6) that the decision or order infringes the Constitution or statutes of the United States, or (7) that the decision or order is otherwise contrary to law.

(c) The judgments of the Circuit Courts of Appeal shall be final, except that they shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U. S. C. Tit. 28, Secs. 346 and 347).

(d) Where the cause of action or controversy is otherwise within the jurisdiction of the United States Court of Claims as provided in Sections 136 to 187, inclusive of the Judicial Code, as amended (U. S. C. Tit. 28, Secs. 241 to 293, inclusive), the petition provided in this section may be to the said Court of Claims at the election of the aggrieved party.

(e) Where a Circuit Court of Appeals or the court of Claims finds itself in disagreement with a previously rendered decision of another court having jurisdiction under this section, it shall certify to the Supreme Court of the United States a distinct and definite statement of the question or proposition of law upon which such disagreement rests, with a statement of the nature of the cause and of the facts on which such question or proposition of law arises together with a statement of the reasons in support of such disagreement. Such further proceedings shall be as provided in Section 239 of the Judicial Code as amended (U. S. C. Tit. 28, Sec. 346).

SECTION 5. *Jurisdiction of Courts to Impose Damages Where Appeal was for Delay and for Costs.* The Circuit Courts of Appeal or the Court of Claims, as the case may be, shall have jurisdiction and power to impose damages in any case where the decision or order of the agency or independent agency is affirmed and the court finds that the petition was filed merely for delay. In all cases the costs on review shall be allowed the prevailing party after final judgment, to be collected according to law.

SECTION 6. *Exceptions and Reservations.* (a) Nothing contained in this Act shall operate to modify or repeal any rights or procedure as now provided by law for any person to have his controversy with the United States heard and determined in any district court or circuit court of appeals of the United States, but the remedy herein provided shall be an alternate remedy for such remedy as may be otherwise provided by law.

(b) Nothing contained in this act shall apply to or affect any matter concerning or relating to the conduct of foreign affairs; the conduct of military or naval operations in time of war or civil insurrection; the trial by courts-martial of persons otherwise within the jurisdiction of such courts-martial; the conduct of the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Interstate Commerce Commission; the conduct of the Department of Justice and the offices of the United States Attorneys, except as otherwise herein specifically provided; or any matter concerning or relating to the internal revenue, customs, patent, trademark, copyright, or Longshoremen and Harbor Workers' laws; or laws relating to Indian lands; or any case where the aggrieved party was denied a loan, or may be dissatisfied with a grading service in connection with the purchase or sale of agricultural products, or has failed to receive appointment or employment by any agency or independent agency. Sections 1 and 2 of this Act shall not apply to the General Accounting Office.

REPORT OF COMMITTEE ON LABOR, EMPLOYMENT AND SOCIAL SECURITY

Scope of Committee and Background of Report—Fair Labor Standards Act of 1938—Legal Questions as to Act and Basic Issues Involved—Social Security Act and Proposed Amendments — The National Labor Relations Act — Suggestions Consistent with Act in Light of Present Experience and Calculated to Regain Public Confidence for Act and Board—Recommendations for Present Action—Separate Statements by Two Committee Members, etc.

AT the request of the President of the Association that a preliminary report be made for the mid-winter meeting of the House of Delegates, your Committee respectfully submits the following:

This Committee was created by the Association in 1936, through the adoption of Article X, Section 12, of the By-laws, which gives the following mandate in behalf of the Association:

"The Committee on Labor, Employment and Social Security shall study and report respecting existing and proposed laws in the Federal sphere concerning labor, employment and social security; and shall formulate and submit such recommendations concerning the same as the committee may deem advisable."

This was done "to the end that the Association might make its humanitarian contribution to the study and development of the law in this expanding field." Up to that time, various Sections and Committees of the Association had dealt with particular phases of labor law and the law of social insurance, but there had been no one instrumentality of the Association charged with the duty of doing what it could to aid the enlightened development of the law of subjects which, during the past few years, have risen to first place in the consciousness of the American people and their lawyers. The instructions to your Committee upon its appointment were that

"it shall, in behalf of the organized profession, render all practicable assistance in connection with the legal problems pertaining to labor, employment, and social security."

Scope of Your Committee

Although the purposes of the Association as indicated in its Constitution (Article I) have not as a rule been given a narrow or limited construction, reference to its stated object will confirm that, aside from such matters as pertain particularly to the interests of the legal profession as organized on a representative basis, the emphasis is upon advancing the science of jurisprudence, promoting the administration of justice, and promoting "uniformity of legislation and of judicial decision throughout the Nation." The stated functions and duties of your Committee are therefore believed to be subject to the emphasis derived from the stated object of the Association, and are regarded as relating to the law of its field in such respects as will advance this new branch of the law as a science, promote its fair and just administration, encourage a uniformity of legislation and judicial decision on this subject throughout the Nation, and thereby make the law of labor, employment and social security an instrument of human welfare, justice, industrial peace, and fair dealing according to law.

With the *policy*—the wisdom or unwisdom—of having labor and social security legislation, your Committee has not concerned itself. The existence and operation of such laws are capital facts in the life of Nation and State. Your Committee accepts them as facts, without present debate as to their policy, and seeks to consider and report upon such proposals as have been offered for their improvement as agencies for the administration of justice and fair play in the broadened sense of today. Considerations of policy are discussed to such extent as they enter into or affect the merits of specific proposals. Such a concept of the functions of a Committee of the American Bar Association forecloses the expression of economic, social and political philosophies which are not held by men as lawyers and as to which there is no ascertained consensus of opinion among lawyers. Furthermore, this report will deal with the laws rather than their administration.

Great moving factors in the economic and industrial life of the Nation profoundly affect the science of jurisprudence and the administration of justice; they should and do command the attention of lawyers. At particularly trying times of readjustment between law and human welfare, every disinterested National institution whose members have trained judgment and diversified experience should try to make its contribution to sound solutions. In the present industrial turbulence, the constructive recommendations of this Association could help toward industrial peace. With a membership made up of lawyers who represent labor organizations, employers and public boards and bodies, your Committee has sought common ground for helpful recommendations.

[EDITOR'S NOTE: We publish a summary and salient excerpts from the report submitted to the House of Delegates, and give the recommendations in full, together with a summary of the separate statements, disagreeing in part, by Mr. Clif Langsdale and Mr. Herman I. Ekern. An account of the proceedings of the House as to the report is published elsewhere in this issue. The House approved and adopted each of the recommendations but did not act upon the discussion contained in the report. Any member of the Association may obtain a copy of the report in full by making a written request to the American Bar Association, 1140 North Dearborn Street, Chicago. Non-members may secure copies at fifty cents per copy, on like request to the Association Headquarters.]

Background of This Report

Without asking that the House of Delegates adopt or approve this report in any respect other than its stated recommendations, your Committee indicates briefly the background or point of view from which its recommendations were prepared:

(1) *Collective bargaining:* Your Committee accepts as a fact the right of employees to bargain collectively, with their employers or with employer organizations, through labor organizations or other representatives which are the free choice of the employees, without coercion or interference by any employers or employer-dominated labor organizations and without coercion or interference through clearly and specifically defined and prohibited practices by any other labor organization or group of employees.

(2) *Tribunals for labor disputes:* Your Committee recognizes also that the right of employees, the public, and of employers, to have the employees' choice of collective bargaining representatives made under conditions of free and unmolested determination as above stated, shall be entrusted, at least under present and prospective conditions, to the jurisdiction of a tribunal charged with the special duty of safeguarding that right of free choice, without partisanship or favoritism for any outcome that should be left to the free choice of the employees themselves.

(3) *Cooperation of lawyers:* Your Committee believes that the fair and amicable functioning of the system of collective bargaining where the employees desire it, and of the tribunals erected by government to safeguard that system, needs to and should have the sincere cooperation of lawyers and their clients, whether the latter be employers or labor organizations.

(4) *Fair labor standards by law:* Your Committee recognizes that in numerous respects supplementary to collective bargaining and to an extent which cannot at this time be charted or delimited, standards as to minimum rates of pay of labor and maximum hours of work are likely to be prescribed by the Federal government and enforced, as to such employees as are engaged in the manufacture and distribution of goods in interstate commerce or in the production of goods for interstate commerce, as those terms may be defined by the Courts or clarified by legislation, and that these standards will in large measure be adopted by many or most of the States, as to wholly intra-State concerns, or will substantially influence State legislation on this subject, in the interests of "uniformity of legislation and of judicial decision throughout the Nation."

(5) *"Sit-down" or "stay-in" strikes:* Your Committee believes, and will recommend that the Association declare, that the forcible occupation and holding of employer property by a labor organization or by employees, in the form of the "sit-down" or "stay-in" strike, should be outlawed as an unfair labor practice by a labor organization or by employees, for the reason that unless and until the law by constitutional means has recognized a property right of employees in the employer-owned machinery or plant or property used in production, such a usurpation of property, unless declared to be illegal and dealt with promptly as such, will jeopardize the very existence of a society in which private property is respected.

(6) *Improvement of machinery for industrial peace:* Your Committee is of the opinion that the long-run interests of the public, the employees, and the employers, are served by industrial peace, by continuity of operations, and by the stabilizing of employment, under conditions just to the wage-worker, the capital in the business, and the consuming public; that those ends are not served by industrial warfare between employers and employees, or between rival labor organizations, or between such organizations and employers; and that if the institution of collective bargaining and the laws to protect it and mediate or determine labor disputes are unsuitable or insufficient to bring about peace for industry and security for the workers, consideration should be given to the practicable ways and means of furthering those objectives.

With the foregoing statement, we proceed to a preliminary report as to what seem to be the principal matters of present significance in this field of the law. Before doing so, your Committee expresses the opinion that with all of its manifestations of conflict and maladjustment, the year 1938 nevertheless saw substantial progress toward sounder bases for industrial relationships in the United States. A greater number of employers came to understand and accept collective bargaining, without reservations of any kind. A greater number of leaders and members of labor organizations came to realize that their future best interests will be secured through responsible and well-managed labor organizations, willing to fulfill contracts and capable of bargaining fairly with employers or representative organizations of employers. The general public came to have a better realization that its rights are paramount, and that the public interest, rather than the special interests of any faction, should be given the primary representation and the first consideration, in the personnel and the work of any tribunal set up by government to supervise labor relations. Undoubtedly among the factors which have contributed to this headway have been the historic decisions of the Supreme Court as to the National Labor Relations Act and the Social Security Act, the Report of the United States Commission on Industrial Relations in Great Britain, and the Report of the same Commission on Industrial Relations in Sweden.[1] Although these informative reports, in which representatives of labor, employees and the public join, make no recommendations as such, they tell an effective story as to the common sense, the restraint, the sense of social responsibility, the obligation to keep agreements, and the spirit of fair play, which promote industrial peace and social security far better than any arbitrary use of power in private or public hands.

I. The Fair Labor Standards Act of 1938

This experiment in attempting by law to equalize working and industrial conditions throughout the United States, perhaps better known as the "Wages-and-Hours law," became law on June 25, 1938, and became operative on October 24, 1938.[2] No working

1. Copies of these two reports can be obtained from the United States Supplement of Documents, Washington, D. C., for 20 cents and 15 cents, respectively. They should be read and studied by every student of labor relations in America. See, also, "This is Democracy," a study of collective bargaining in Scandinavia, by Mr. Marquis W. Childs.

2. For an analysis and expository discussion of the Act by Mr. Henry Epstein, Solicitor-General of the State of New York and a member of your Committee, see American Bar Association JOURNAL for December, 1938 (pages 965-969). Some of the constitutional and industrial questions posed by the Act are there stated and discussed. The article presents the views of its author, and its contents have not been passed on by the Committee.

appraisal of the Act can yet be made. Thus far the Act and its Administrator have had, and have deserved, the sympathetic and open-minded cooperation of lawyers and employers generally. The Federal Administrator has acknowledged the voluntary response of the employers.[3] It has been a striking and most encouraging demonstration of the fair trial which can be secured for legislative innovations, given an understanding and open-minded approach on the part of those entrusted with the administration in behalf of government.

Fair testing of the practical operation of the labor standards erected by the Act is facilitated by the fact that the Act and the regulations under it so far have required no affirmative or overt act, on the part of an employer, to evidence submission on his part to the Federal jurisdiction as to any of his employees. If he conforms to the *standards* and keeps his records so that his conformance can conveniently be checked should occasion arise, he does not need to decide or declare that he or any of his employees are subject to the new assertion of Federal authority over manufacture. No particular form of keeping records has been prescribed by the Administrator, and those already kept by large industries are believed generally to be substantially sufficient. No filing of reports by employers has been prescribed by the Administrator, and it is said that no such requirement has been in contemplation.[4] All this has permitted an employer to conform in good faith to the new *standards* and at the same time hold in abeyance his desire ultimately to contest any claim that he and his employees are subject to Federal jurisdiction under the Act.

The prescribing of fair labor standards as to minimum wages, maximum hours, overtime pay, etc., by legislative action rather than the processes of collective bargaining between labor organizations and employers, has represented steps at least in the direction of departure from the traditional preference of the craft unions for determining such matters through contracts with employers. This transition comes at a time when the combined membership of the two National groups of labor organizations is claimed by them to have risen from a total of about 3,000,000 in 1934 to about 8,000,000 in 1938, along with the definite alignment of the governments as aid and bulwark of the integrity of the processes of collective bargaining. To what extent an increase in the efficacy and responsibility of dealing with such matters by wage contracts may abate the advocacy of legislative standards by the labor organizations cannot now be forecast. Continued dealing with such standards primarily by legislation in the political sphere rather than by collective bargaining with employers would probably have extensive repercussions as to the nature and status of labor organizations in the United States.

Legal Issues as to the Act

Legal issues as to the Act are bound to arise, and some of them are serious. Not a few of these are sheer matters of interpretation—clarification by judicial legislation—as some parts of the Act lack certainty and clarity in definitions as well as substantive provisions. Decision seems not yet to have been made by the Administrator as to whether to attempt the essential clarification by adjudication in litigation or by amendment at the hands of the Congress. Enforcement and enforceability are other problems. Thus far the employers and their counsel have avoided a great deal of expense to government and friction on the part of all concerned, through reasonable efforts to cooperate and comply until the situation and the statute are clarified.

More serious issues under this statute arise as to the extent to which, if not amended by the Congress and sustained by the Courts as apparently written, any remaining jurisdiction and control of the States over intra-State manufacture and local concerns will be destroyed or atrophied, in the guise of subjecting wholly to the Federal standards the working conditions affecting the production or distribution of any articles which are known by their producer to be destined ultimately for interstate shipment by others, although produced and sold solely within the State by the employer whose wages and hours are subjected to "remote control" from Washington.

In the absence of judicial interpretation of the Act and the first opportunity for legislative consideration of possible amendments to the Act, as well as in view of the limited period of its operation thus far by general acquiescence in giving it a fair trial, your Committee believes that it would be premature to attempt here to make an appraisal of the Act or to bring forward proposals for its amendment. Indeed, it would seem to be true that most of the questions which can properly arise thus far are of public policy, constitutional theory, and administrative detail, rather than matters for the action and recommendation of the American Bar Association at this stage. If the Act as drawn is too broad and pervasive and if it strikes too deeply at matters which are better left to the State, that question of policy as to limitation by amendment will arise soon in the light of experience.

Those engaged in industrial and commercial life or in giving advice as to its legal phases will do well to study carefully the Act and administrative rulings thereunder. Lawyers with potential cases for review

SUMMARY OF ACTION OF HOUSE OF DELEGATES AS TO LABOR LAWS

Recommended cooperation in fair trial of standards of Wages-and-Hours Act, with amendments.

Approved in principle the recommendations of Advisory Council on Social Security.

Urged uniformity and simplification of data, forms, reports, etc., under Federal and State Labor and Social Security Laws.

Condemned "sit-down" or "stay-in" strikes and urged prohibition of them under Labor Relations Acts.

Urged that strikes by organizations of employees of Federal and State governments be outlawed.

Recommended amendment of National Labor Relations Act to give employers the right to petition for an election, under safeguards.

Favored amendment of Labor Relations Act to prohibit specifically defined unfair practices by labor organizations.

Favored amendment of Labor Relations Act to prohibit minority strikes, picketing, boycotts, etc., after majority union has won an election.

Recommended that consideration be given to enactment of State Labor Relations Acts giving effect to above amendments.

3. Address before the American Association for Labor Legislation, at Detroit, Michigan, December 29, 1938.

4. See, however, *Wages-and-Hours Reporter*—January 1, 1939 (pages 5-6).

have both fairly and prudently abstained from hastening into the judicial arena with process for review. When the time comes, as soon it will, for orderly litigation as to interpretation and constitutionality, members of the Bar will do well to be sure that a proper and sufficient factual record is fairly made in each instance. On the basis of the experience had in cases arising under the National Labor Relations Act, the Courts are likely to insist that *substantial* evidence as now broadly defined shall be the basis for the findings[5] and that the ultimate, conclusory findings shall be amply supported by evidence probative as to the primary facts.

Basic Issues Involved

With this leverage as a basis for review, and with the continuance of an enlightened sense of social stewardship on the part of lawyers for employers, labor organizations and the government, there seems no imminent danger that the basic rights of anyone will be irrevocably destroyed during a reasonable period of trial and testing whether working conditions can be broadly equalized without doing too great damage to small enterprises, local producers, and the costs and prices of products when merchandised. The extent to which industrial modernization will be forced to take a fuller advantage of technological processes for labor-saving, is a phase of the matter which will be closely observed by both employers and the employed, as the maximum hours of the workweek are shortened and the minimum rates of pay for the reduced hours are raised, if the Act is continued in force in its present form. Basically, however, the extent to which the powers and historic functions of the States are to remain abridged by this Act is an urgent question for the Congress, rather than the Courts, which could not be expected at this juncture to nullify the present legislative policy that the powers of the States be taken away and Federal standards made supreme in this field.

Some persons and organizations have favored the enactment of State laws prescribing fair labor standards adapted from the Federal Act, because of a hope that such a manifestation of State legislative activity to equalize working conditions might decrease the need and the likelihood of judicial decision and legislation carrying the Federal powers further and deeper into what has historically been considered the domain of the States. Such a ground for urging State legislation in this field has not been sustained. If the Congress determines that the Federal government shall actively exercise its full powers in the interstate commerce field, in derogation of the rights of the States, the presence or absence of State legislation presently occupying the field does not set or affect any boundaries of the National power.[6]

Among the most significant provisions of the Act are those which prescribe standards limiting the labor of children in industry. Litigation as to them will present soon the question whether the Supreme Court will adhere to its ruling in *Hammer v. Dagenhart* (247 U. S. 251) and the decisions influenced by that ruling, which have given rise to agitation for amendment of the Constitution. The Child Labor provisions of the 1938 Act are under the special jurisdiction of another Committee of the Association and so are not commented on here.

Amendments or Adjudication?

The view and experience of the Administrator have been indicated to be thus far that "there are certain things that we feel should be clarified" and that once industry becomes accustomed to the new law, drastic changes in it should not thereafter be proposed. Accordingly, he has suggested that if proposals for sweeping amendments are to be made, they should be brought forward without delay. Although some of the questions may be clarified by the Courts, the Administrator has indicated that amendments to the law may be needed on other points. "It is the duty of the Administrator to suggest to Congress any amendments which may be needed to make the law more effective," he declared.[7] "However, it is too early in the life of the Fair Labor Standards Act to have any definite views on amendments."

Although your Committee is not prepared at this stage to offer or approve specific suggestions for amendment of the Act, there are a few matters to which reference may be made, for information and consideration. * * *

[The Committee's report at this point discusses in detail these several "specific suggestions for amendment," e. g., limitation of overtime pay for highly paid supervisors and others whose time is generally under their own control, the operation of Section 7(b) of the Act, and the lack of clarity in Section 7(b) taken in conjunction with Section 18 of the Act. The report continues:]

The above discussion of several suggestions which have been broached for amendments of the Act is submitted as worthy of consideration by those dealing with the subject, but none of them has yet reached the stage where your Committee submits a definitive recommendation for the action of the House of Delegates. Your Committee will continue its study of the operation and interpretation of the Act, with a view to making specific recommendations as soon as it seems appropriate.

II. The Social Security Act and Proposed Amendments Thereto

The law and public policy of this subject have been substantially advanced during the past month, through the comprehensive report of the Social Security Advisory Council created in May of 1937. The considerations which were discussed in the report of your Committee last July are reflected in the studies and recommendations of the Advisory Council. The latter body was named jointly by the Social Security Board and a Special Committee of the United States Senate on Social Security. The Council is made up of twenty-five members—six representing labor (including officers of both the American Federation of Labor and the Committee for Industrial Organization), six representing employers, and thirteen comprised in large part of economists connected with universities, representing the public.

The report represents a sustained effort to arrive at practicable and enlightened conclusions from a realistic view of the facts. A perhaps surprising aspect is that every member of so diversified a Committee signs

5. *Consolidated Edison Company of New York, Inc.* v. *National Labor Relations Board*, — U. S. —; 59 Sup. Ct. R. 206.

6. *Consolidated Edison Company of New York, Inc.* v. *National Labor Relations Board*, — U. S. —; 59 Sup. Ct. R. 206, 214. [Quoted in the foot-note to the Report].

7. Address by Administrator Andrews before the Brookings Institution, December 21, 1938.

the report, with "minority reservations" on only a few points. Beyond a doubt, the report advances the whole subject immeasurably, and if revamping of the Social Security Act is to be undertaken at the present session of the Congress without further expert study and public discussion of the recommendations of the Advisory Council, the present report is likely to be taken as chart and compass for those legislators who seek guidance to an intelligent and forward-looking revision. As predicted in the report of your Committee last July, the removal of uncertainty as to the constitutionality of the main features of the Act[8] has led to definite steps to reconsider and revise some of its rather awkward or inapt provisions, which probably had their origin in a desire to improve the probabilities of a favorable decision as to validity. * * *

[The report at this point outlines and comments upon the salient recommendations of the Advisory Council as to the enlargement of coverage, changes in benefits, and financing the cost of social security, including the transforming of the "reserve" into one for "contingencies." By way of summary of *principles* underlying the recommendations of the Advisory Council, the report states in the paragraph to which the attention of the House was called on the oral submission:]

"The point of view and objective of the Advisory Council are that the total cost of social security under the Act shall not now be increased beyond substantially what was contemplated under the Act when first passed. To that end, along with liberalizing the coverage, the Council suggests offsetting reductions of some of the larger benefits now provided for remote years. Three basic principles stated by the Advisory Council may be noted and approved:

The pattern cannot be larger than the cloth; the degree of security afforded must be limited by the National income and the proportion of that income properly available for any specific purpose.

No benefits should be promised or implied which cannot be safely financed * * *.

We should not commit future generations to a burden larger than we would want to bear ourselves."

[After reviewing the various recommendations of the Advisory Council, the report continues:]

Approval in Principle Sought

Although the report of the Advisory Council presents many questions which are acutely debatable because social and economic philosophy, if not political considerations, enter deeply into them, your Committee is of the opinion that if the recommendations of the Advisory Council were embodied *in toto* in the Social Security Act, that law would be greatly improved and would be linked more closely to reality, practicability, and sound social justification. * * *

Standard Forms and Data Needed

Your Committee submits at this time, however, a recommendation to the various departments, boards, bureaus and officers of the National and State governments, including those dealing with social security and those dealing with labor laws, that at the earliest opportunity steps be taken to study, and to standardize and coordinate wherever possible, the informational forms, data, reports, etc., required by employers by the various laws and regulations—all to the end that the present heavy burden and expense of "paper work" be lightened so far as practicable. If the American Bar Association can aid and advance, through any assistance or support it can give, the standardizing and simplifying of payroll reporting under the many laws, that will be a great boon to both small and large enterprises throughout the land. In many small businesses, the added expense of the many forms, records, subdivisions of data, preparation of reports, and the like, tends to eat up what small profit there might otherwise be in the business of the employer. Minor variances in such forms and data are costly, and often are avoidable.

[The report as to social security, etc., concludes with discussion of "a needed unifying of governmental agencies, and poses the question:]

May we submit for consideration that there is in all this but one basic problem—the provision for those in need? And by *need* is meant, of course, the absence of provision for a decent and reasonable standard of subsistence according to American habits of life. It may be that one possible subdivision should be made—a segregation of unemployment benefits during periods of unemployment from the other phases—yet this, too, is debatable ground.

If there is one basic problem, should it not be faced courageously and honestly—to the end that its solution be as direct and as economical as possible? If local administration, within States, is to be the mechanism, with Federal assistance—then let a final decision be so made. If it is better that such a vast problem be administered on a Nation-wide plane, then let a Federal Department of Welfare be created and have the regional or State agencies created for distribution be set up on a sound basis. * * *

III. Labor Legislation by Vote of the Electorate under Initiative or Referendum

One of the significant developments of the year has been the resort to initiative and referendum provisions of State laws, in order to obtain a vote of the electorate upon questions affecting the rights and liabilities of labor organizations and employers in relation to collective bargaining, etc. * * *

[The report then presents the facts as to the Constitutional Amendment adopted by the voters of the State of New York on November 8, 1938, ensuring certain rights of labor; the Initiative Act as to strikes, lockouts, etc., defeated by a vote of 268,848 to 295,431 in the State of Washington; the Initiative Act as to labor organizations and labor disputes, defeated by a popular vote of 1,067,229 to 1,476,430 in the State of California; the Initiative Ordinance adopted by the citizens of Los Angeles on September 16, 1938, by a vote of 199,000 to 152,000; and the Initiative Act adopted by the people of the State of Oregon on November 8, 1938. The last-named Act, enacted directly by the voters of Oregon, is stated to be "the most severely restrictive measure that has been put in force as to labor organizations in any American State." The report discusses the measure and the grounds urged in the litigation as to it. The report continues:]

Labor Laws by Popular Vote

Irrespective of whether, in the particular instance, the referendum method of labor legislation results in the adoption of measures highly favorable to labor organizations, as in New York, or in the enactment of a law seriously restrictive upon organized labor, as in Oregon and in the City of Los Angeles, or in the

8. *Steward Machine Co. v. Davis*, 301 U. S. 548; *Helvering v. Davis*, 301 U. S. 619.

rejection of restrictive legislation by a close vote after a heated public debate, as in California and Washington, your Committee is of the opinion that the processes of the initiative and referendum are not well suited to the consideration and enactment of fair and constructive laws in this difficult field of social responsibility. Generally speaking, such matters will be handled far more justly and remedially through the processes of mediation and adjudication, each placed in the hands of an impartial, competent and independent board, with clear and specific definitions of the labor practices to be sanctioned and of those to be prohibited and prevented. Resort to pure democracy in lieu of the more deliberate processes of the representative system is not likely to obtain legislation, in the long run, that is fair and just for either employees or employers.

Significance of the Vote Polled

Aside from pointing the advisability of adhering to the processes of representative government in this field, there are at least two phases of the votes polled in Oregon, California, and Washington, which may be of a broader significance than the particular statute and the particular State: In the first place, it will be noted that in each instance there was a large vote polled in favor of legislation which would clarify and specify the labor practices to be outlawed and would declare illegal various specific practices by labor organizations, along with those prohibited to employers. * * *

In the second place, it seems that a considerable but imponderable factor in the vote polled in favor of the initiative measures in these three large States was an openly expressed feeling that inasmuch as the National Labor Relations Act prohibited no unfair practices by labor organizations and gave neither to employers nor the public any remedy or redress against them, the voters of those States should take the situation into their own hands and enact laws which specified and prohibited unfair labor practices by unions as well as by employers. * * *

IV. The National Labor Relations Act, the State Labor Relations Acts, and Proposed Amendments Thereto

In considering the question as to whether or not the time has come to consider amendments to the National Labor Relations Act, a fair understanding of the matter will not be approximated unless there is first a realization of the original objectives of the Act and the reasoning of those who have so far opposed amendments. Considerable of the discussion which has taken place as to the matter has been more or less beside the point, because it has failed to take into account the nature of this particular agency of government and the purposes for which this Act was passed.

By a large part of the public it has been supposed that the National Labor Relations Board was created for the purpose of providing an independent and impartial tribunal for the redress of grievances and the prevention of improper practices in the field of labor relations—a tribunal to which employers and employees could go with complaints, as shippers and carriers go to the Interstate Commerce Commission or as consumer organizations and merchandisers go to the Federal Trade Commission. The creation of a special administrative tribunal of that kind for fact-finding and determination as to labor controversies and labor relations, however, was not, as we understand it, the purpose and objective of the National Labor Relations Act when it became law in 1935.[9] That statute was designed by its sponsors to try to create an *equality* as to the processes of collective bargaining where the conditions were believed at that time to be unequal because of the employers' ascendancy under mass production in "the machine age." To try to create and fortify an equality in that field, it was planned to have the government safeguard and defend the rights of employees.[9a] This concept did not call for a tribunal to which employers could go, and did not call for the outlawing of any practices by employees.

Defense of Workers' Rights by Government

In other words, the National Labor Relations Board was intentionally created as an agency to defend and protect the workers' rights of choosing freely their representatives for collective bargaining, to outlaw "company unions" and company-dominated unions, to prevent and redress the discharge of workers for membership or non-membership in a particular union, and generally to prevent employer interference with each worker's right to belong to any union or to no union. The Act was not passed to prevent some employees from interfering with or coercing other employees in choosing whether they will belong to a union or no union. Still less was the Act designed to afford to the employer any right to petition for an election of employees or to receive any protection whatever from the Board as to improper labor practices by labor organizations or their members—the *employer* was left wholly to his remedies in the Courts. To illustrate: With a primary objective the defense of workers against "company unions", the Act withheld from an employer the right to petition for an election, lest he petition at a time when the "company union" would win. Furthermore, many persons have urged that any improper practices from which employers need protection, or from which one group of employees needs protection from another group, can be sufficiently dealt with by suit in the Courts or by action of the local police authorities.

Believing that the purpose of that Act was to equalize conditions of collective bargaining where otherwise equality had not existed, many friends of the Act have sincerely opposed and resisted all efforts to transform the Board into a tribunal to which employers may bring petitions—a tribunal administering an Act which defines, and outlaws specific unfair labor practices by employees, as well as those prohibited to employers. In fairness to all concerned, it should be noted here that, as probably was to be expected and despite this reluctance to see the original theory and scope of the Act changed by amendment, the Board, its procedure, and the tempo of its proceedings[10] under the recent rulings of the courts, have been moving in the direction of more open-minded pursuit of the facts and realities which serve industrial peace. * * *

Trend of Public Opinion

Aside from the reasoning of those who have been reluctant to risk changing the philosophy and purpose

9. Dean J. Warren Madden, Chairman of the National Labor Relations Board then and now, wrote in the December, 1935, issue of the *American Labor Legislation Review* (page 179) [quoted in the report].

9a. See *American Labor*. By Herbert Harris (Yale University Press—1938.)

10. See *Ford Motor Company* v. *National Labor Relations Board*, U. S. ; decided January 4, 1939.

of the Board, there is a further consideration of undoubted practical importance under democratic government; viz., that to an increasing extent the general public has come to believe the essential one-sidedness, partisanship, and unfairness of a National Labor Relations Board to which only labor organizations and employees have the right of complaint and the right to petition for an election—a National Labor Relations Act which forbids unfair labor practices by employers but subjects labor unions to no duty or obligation of fairness towards either employers or workers—a National Labor Relations Act under which the "sit-down" or "stay-in" strike is thus far tolerated or at least not disapproved as an improper practice, and under which even a certification or election under National Labor Relations Board auspices brings no relief or peace to the employer from minority strikes, boycotts, intimidations, and molestation of the right of the majority to work under the Board's certification.

Experience has shown that the appearance as well as the actuality of fairness are vital especially where administrative agencies of government supersede resort in first instance to law-governed Courts. As a practical matter, it appears that American public opinion may be persuaded to view that, irrespective of whatever is said as to personnel or decisions, a Labor Relations Act is one-sided and contrary to the American spirit of fair play and proper structure if it outlaws unfair practices of employers but not of employees and if it is a tribunal solely for employee organizations and not for employers.

Under such circumstances, it is the earnest opinion of your Committee that friends of the Act and friends of industrial peace through the orderly and impartial adjudication of such labor controversies as are entrusted to the Board may well make common cause in considering what amendments, if any, can advisably be made to end the present appearance and actuality of one-sidedness, without, however, impairing the efficacy of the Board as a protective agency in behalf of the employees' right to choose freely their labor organization or no labor organization, without interference by either employer or labor organizations in any respect clearly and specifically defined and proscribed by the Act.

With proposed amendments which are sought only by employers to change substantially the original intent and purpose of the Act, and with amendments which are urged or opposed chiefly by opposing factions of labor organizations, your Committee has not thus far concerned itself; and it makes no present recommendations as to such proposals. This preliminary report deals with such suggestions as are consistent with the Act in the light of present experience and would be likely to regain for the Act and the Board a more responsive public confidence. * * *

1. Should the Act be amended so as specifically to give to employers the right to petition for an employees' election to choose their collective bargaining representative, in situations where no "company union" is found by the Board to be involved?

This equal right of petition to the Board on the part of employers, if not specifically denied by the language of the Act, has been denied by the rulings and interpretations by the Board. The New York State Labor Relations Act accords such a right to employers, and there have been no untoward consequences. Consistently with the original purpose of the Act to prevent an employer from precipitating an election to secure the certification of a "company union," the duty of the Board to grant such a petition by an employer could be limited to situations in which the Board found no "company union" or company-dominated union to be operative. The Board indubitably has both the powers of investigation and the powers of outlawry, to prevent a petition by an employer from being used to frustrate the employees' own free choice, whether that means a particular union or no union. To accord to employers as well as labor organizations a fair right of resort by petition to the Board might do something to remove a widening public impression that the Act itself is one-sided.

2. Should the Act be amended now so as to define and forbid as unfair certain specific and clearly defined practices by labor organizations and groups of workers, including both practices directed against employers and against free choice by individual workers?

There should be no coercion or intimidation by employers to prevent union membership or to secure membership in a particular union, and there should be none by labor organizations or groups to compel or prevent joining a particular union or no union. The essential thing, however, is clear and specific definition and limitation of the practices prohibited, to employers and to employees. Prohibitions of coercion and interference "from any source" are far too vague a phrase. The things which unions and workers are forbidden to do, to each other or to employers, should be clearly and specifically stated and limited, as unfair labor practices by employees.

Chief among these practices to be forbidden, for reasons already stated by your Committee (see pages 5 and 6, *ante*), should be any resort to "sit-down" or "stay-in" strikes. Such methods and practices are repugnant to American ideals and destructive of the institution of private property. There are other unfair labor practices by employees to be interdicted, but the amendments should make all definitions clear and specific.

Although employees of the Federal, State and local governments are not subject to the National Labor Relations Act, considerable headway has been made in their organization; and your Committee is of the opinion that this phase of employee organization ought not longer to be disregarded but should be remedially dealt with, for the development of sounder bases. There is no reason for looking with doubt or disfavor upon the organization of employees of government units, whether into organizations which are independent or are limited to government employees or are affiliated with National groups of labor organizations, *so long as* such organization of government workers is solely for the purposes of the collective presentation of grievances, recommendations on policy, conditions of work, and the like. Your Committee is of the opinion, and respectfully urges, that under the National and State Labor Relations Acts and otherwise, no recognition for collective bargaining and no standing to seek the protection of any statute shall be given to any organization of government employees which does not in its constitution affirmatively renounce and bar the use of the weapon of the strike as a means of coercing government and thereby attaining or furthering its aims.

3. Should the Act be now amended so as to provide that after an election or a certification of a majority bargaining agency, no minority strike,

picketing, or boycott should be tolerated; and any labor organization resorting to such weapons should be denied standing or recognition for a definite period in that plant or industry, under the Act?

A labor faction which loses a Labor Board election or certification should lose its right to call a strike and picket a plant. Where a bargaining agent has been duly chosen by the majority, there should be no minority picketing, no minority offenses against the employer and against the majority's right to work. Employers and majorities should not be left at the mercy of guerrilla warfare by minorities. A certification by the Board, with or without an election, is a judicially reviewable determination when made. The making of such a certificate of the lawful bargaining agency should bring industrial peace in the plant or larger unit for at least a year. The right of the employer to operate and the right of the majority to work, without picketing or molestation, should be protected after certification, by making contrary conduct by a minority organization an unfair labor practice.

4. Should the Act be now amended so that the decision and findings, particularly the conclusory findings, of the Board shall be made judicially reviewable on the law and the facts?

This contention by some persons is based principally on their idea that the Board has been made an avowed partisan of labor organizations against employers and of one faction of labor organization against another,[11] and that the fact-findings of a partisan organization under a one-sided statute ought not to be accorded the usual status of findings by an independent, quasi-judicial board. Despite their insistence on preserving the different status of the Board as governmental champion of but one side in labor controversies, many friends of the Board protest any proposal to treat the findings of the Board other than as those of an open-minded, impartial and quasi-judicial body.

Two things are at this time pointed out by your Committee: In the first place, the question of the attitude of the Association as to the scope of judicial review of fact-findings is primarily to be determined as a general principle or policy, and not merely as to the National Labor Relations Board. The report of the Special Committee on Administrative Law, which is before the House at its January meeting, presents that broad issue; and no recommendation by this Committee particularly as to the National Labor Relations Board seems to be indicated. In the second place, the scope and character of the judicial review of the decision and findings of the National Labor Relations Board have lately been defined and broadened by the Supreme Court,[12] and the whole question may deserve and require reconsideration in the light of this salutary pronouncement. The Court has given a broad and vital meaning to *"substantial* evidence," and has barred findings which rest only on evidence lacking in probative force in a Court of law or equity.

Your Committee does not support at this time the idea that the American Bar Association need or should take a different stand, as to judicial review of findings by the National Labor Relations Board, from that taken by the Association as to independent and impartial administrative agencies of the government.

5. Other suggested amendments of the Act, as to which your Committee makes no present recommendation.

There have been several other amendments of the Act suggested, but for the reasons indicated hereinafter your Committee makes no present recommendation as to them, beyond stating them for information and consideration.

Two suggestions of considerable practical importance emanated from the 1938 annual convention of the American Federation of Labor, with the approval of that body. They appear particularly to arise out of the conflict between the Federation and the CIO. The first of these proposes an amendment to the effect that within any plant or other appropriate unit, the members of a craft union shall have the right to decide whether they wish to be a separate unit represented by their own craft union or to be included with nonmembers of the craft on a plant or other inclusive basis. The leaders of the American Federation of Labor have complained that the National Act permits their craft members to be swept into a "vertical union" unit, with loss of identity.

This proposed amendment would in effect conform the National Act to the New York State Labor Relations Act. Section 9 (b) of the National Act authorizes the Board to decide in each case the unit appropriate for the purpose of collective bargaining. The New York State Board is given no such unfettered discretion; under Section 705 (2) of the State Act "in any case *where the majority of employees of a particular craft shall so decide*, the Board shall designate such craft as a unit appropriate for the purpose of collective bargaining."

A second suggestion of amendment emanating from American Federation of Labor sources would specifically take away any power of the Board to invalidate or "disestablish," or to make a "cease and desist" order as to, a collective bargaining contract between an employer and a labor organization which is not a "company union" or company-dominated. The power of the Board, in a proper proceeding, to nullify such a contract with a company union has been adjudicated and is not in controversy.[13] The Supreme Court has declared that "the Act gives no express authority to the Board to invalidate contracts with independent labor organizations."[14] Whether such a power will under any circumstances be vested in the Board by inference, upon proceedings conforming to due process of law, has not been specifically held. The Federation asks that the Act be amended so as specifically to negative and exclude such a power, which it says the Board has used to strike down Federation contracts.

In omitting any recommendation at this time upon these suggestions, your Committee does not negative or pass upon their merits. Should these proposals come to the stage of consideration from the point of view of the interests of the general public, your Committee may make recommendations as to them. At the present stage, your Committee deems it better that the Association take no laboring oar in behalf of any

11. A recommendation that decisions of the Board be made reviewable on the facts as well as the law was referred by the American Federation of Labor, at its recent Houston Convention, to its Executive Committee.

12. For the majority of the Court, Chief Justice Hughes said, on December 5, 1938, in *Consolidated Edison Company of New York, Inc. v. National Labor Relations Board* (— U. S. —; 59 Sup. Ct. R. 206, 216) [quoted in the report].

13. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 58 Sup. Ct. R. 571.

14. *Consolidated Edison Company of New York, Inc.* v. *National Labor Relations Board*, U. S. ; 59 Sup. Ct. R. 206, 219.

proposal which at the time is sponsored chiefly by one side or the other in the present strife between factions of labor organizations. Your Committee can see no legal or practical reason why the integrity of craft unions as well as the usefulness of inclusive, vertical units cannot be preserved for collective bargaining purposes within the structure of labor organization, in the interests of a maximum of stability, responsibility, and solidarity.

Many of those who have studied the reports of the Commission on Industrial Relations in Great Britain and in Sweden have been impressed with the wisdom of broadening the definition of the term "employer" in the National Act, so as to permit employers to be represented collectively by an employers' federation or association, as is done abroad and has lately been developed in the San Francisco area. This suggestion has hardly reached the stage where your Committee is ready to make a recommendation as to it.

The proposal has been earnestly made by some persons that the investigating and prosecuting functions of the Board should be separated, as far as possible, from its quasi-judicial and fact-finding functions. This is a large subject; your Committee is engaged in studying it, and will expect to submit views or recommendations about it, to the meeting of the House next July.

The proposal has been made that the Act should be amended so as to return to the jurisdiction of the States and the State boards or other agencies of mediation or arbitration the labor relations and labor disputes arising as to employers not themselves engaged in interstate commerce. This is a question of legislative policy as to the scope of the Act, and your Committee states no opinion or recommendation as to it at this time.

At least as soon as the National Labor Relations Act has been amended in the vital respects which have been hereinabove recommended for action at this time, your Committee favors and recommends the enactment of similar State Labor Relations Acts, to aid in removing the causes of industrial strife and preserving the bases for industrial peace.

The foregoing is not meant to cover the whole subject of amendments to the Act, or to negative or pass unfavorably upon suggestions not mentioned. A few specific proposals which seem to warrant favorable action at this time have been stated and discussed. Other suggestions have not been passed on. Aside from the recommendations specifically made, this preliminary report is a "progress report" as to the matters thus far considered by your Committee, and will be supplemented by our further report next July.

Recommendations for Present Action

Your Committee respectfully recommends that the House of Delegates approve severally the following resolutions:

(1) That the Association is of the opinion that employers, labor organizations, and lawyers for either, should cooperate in a fair trial of the labor standards prescribed by the Fair Labor Standards Act of 1938, without waiver of rights, and that suitable amendments to clarify the Act along lines consistent with its basic purposes should be drafted and acted upon by the Congress at the earliest practicable time.

(2) That the recommendations of the Advisory Council on Social Security, as to changes in the plan and provisions of the Social Security Act and the financing thereof, are approved in principle, and that specific recommendations of amendments be presented by your Committee in form for action at the July meeting of the House of Delegates.

(3) That the Association urges that various departments, boards and officers having to do with labor, employment, and social security in behalf of National and State governments, should take steps whereby, as far as possible, the informational forms, data, statistics, reports, etc., required of employers under the multiplying statutes and regulations, shall be studied, reconciled, standardized, coordinated and simplified, with a view to lightening the burden and expense of "paper work" required from employers, particularly from the smaller employers to whom the many duplications with minor and avoidable variances are a serious burden.

(4) That in the opinion of the House of Delegates the forceful occupation or holding of employer property, in the form of the "sit-down" or "stay-in" strike, is a usurpation of property which jeopardizes the very existence of a society in which property and rights are respected, and that such occupation or holding should be outlawed as an unfair labor practice by labor organizations and by employees under the National Labor Relations Act and the State Labor Relations Acts.

(5) That the Association is of the opinion that although the employees of National, State and local governments may rightfully organize, whether independently or in affiliation with National groups of labor organizations, so long as they do so solely for the collective presentation and discussion of grievances, recommendations, etc., no organization of government employees should be recognized for any purpose or given any standing under any statute or regulation, unless such organization shall expressly in its Constitution renounce and bar the weapon of the strike as a means of coercing government and thereby attaining its aims.

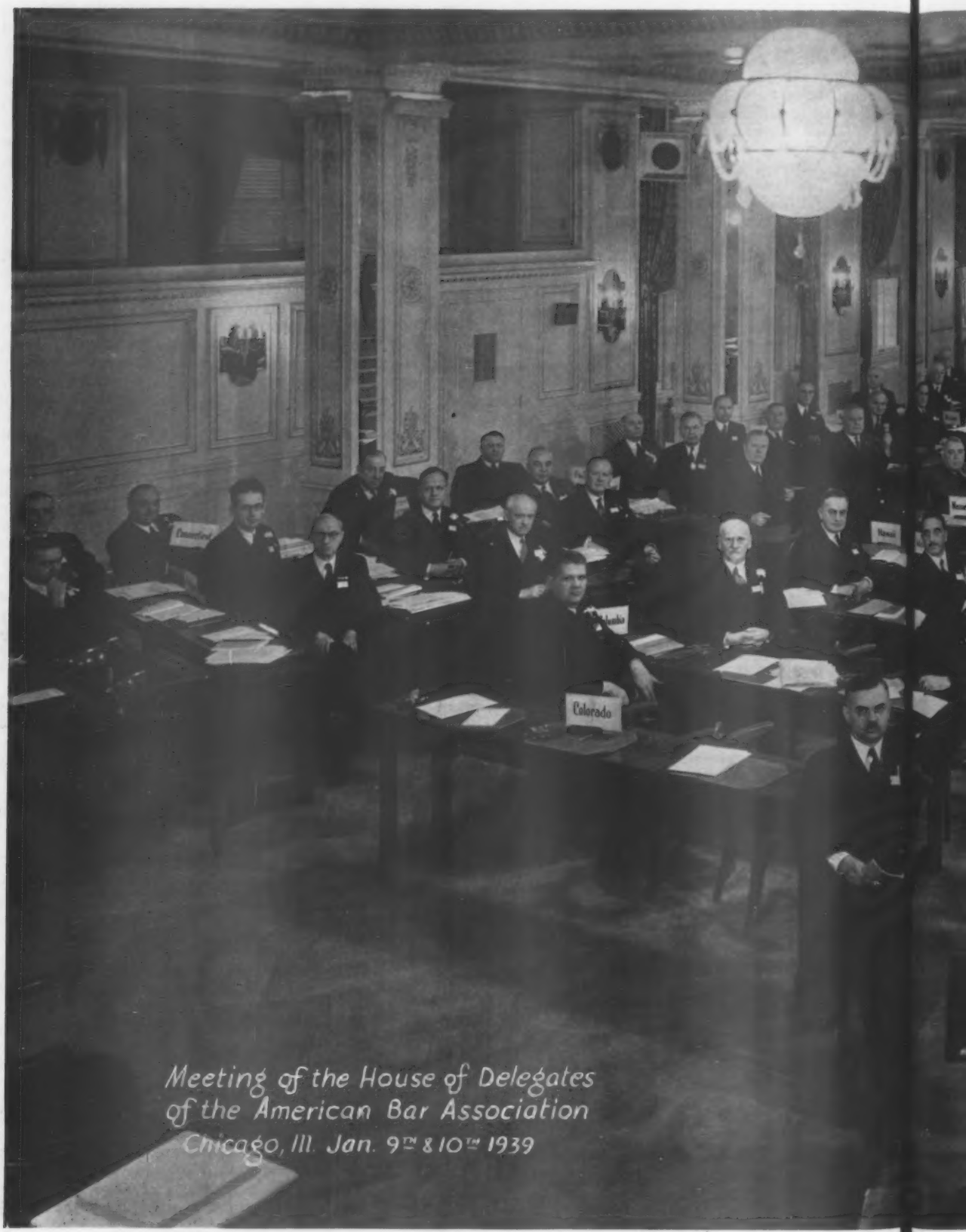
(6) That the Association recommends that the National Labor Relations Act should now be amended so as specifically to give to employers the right to petition for an employees' election to choose their collective bargaining representative, in situations where no "company union" is found by the Board to be involved.

(7) That the Association is of the opinion that the National Labor Relations Act should be amended now so as to define and forbid as unfair and illegal certain specific and clearly defined practices by labor organizations and groups of workers, including both practices directed against employers and against free choice by individual workers; and that such amendments should clarify the Act and clearly specify what practices are to be deemed coercion, interference, intimidation, domination, etc., by employers and by labor organizations, and should not merely forbid coercion, etc., "from any source."

(8) That the Association is of the opinion that the National Labor Relations Act should be amended now so as to provide that after an election or a certification of a majority bargaining agency, no minority strike, picketing, or boycott should be tolerated and so as to provide that any labor organization resorting to such weapons should be denied recognition and standing for a definite period in the plant or industry, under the Act.

(9) That consideration should be given by the respective States to the enactment of State Labor Relations Acts, in such form as to give effect to the amend-

(*Continued on page* 162)



Meeting of the House of Delegates
of the American Bar Association
Chicago, Ill. Jan. 9th & 10th 1939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AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR
MANAGING EDITOR
Journal Office: 1140 N. Dearborn Street
Chicago, Illinois

IMPRESSIVE MEETING OF THE HOUSE OF DELEGATES

The representative body of the Association and the profession of law met mid-year in Chicago on January 9-10, and transacted a great deal of important business in a thoroughly deliberative manner which should give great weight to the decisions made. The spectacle of delegates from forty-eight States and the District of Columbia—147 busy men who are in the top rank of lawyers in their respective States—coming together open-mindedly to debate and develop a consensus of opinion upon proposals which are of no advantage to them except as the public interest is served, was heartening and impressive. With the advent and active participation of many newcomers from State and local Bar Associations throughout the country, the House has grown steadily in stature, sure-footedness, and capacity for taking all reasoned points of view into account, as well as in the thoroughly representative character of its membership.

Because of the significance of many of the matters discussed and voted on, this issue of the JOURNAL presents an unusually comprehensive account of the proceedings of each of the the meetings as a whole. First among its accomplishments was the action taken, after a day's debate, upon the far-reaching bill recommended by the Committee on Administrative Law. This measure was debated section by section and "literally line by line." Amendments to improve and clarify the bill were freely voted; efforts to delay or defeat it by re-committing it were stoutly resisted, by a decisive majority of the House. Under the active leadership of President Hogan, the House never deviated from its purpose to perfect a bill which could be sent forthwith to the Congress with the approval of the House in behalf of the Association. The final vote after full debate of high quality was decisive to that end. Despite differences of opinion as to some features, the consensus of opinion was strongly that, after several years of thorough consideration, the Association has produced and sponsored a bill which, if enacted, will mark a great step toward checking abuses but preserving the good inherent in the administrative agencies.

This measure was by no means the sole accomplishment. Through adopting a series of constructive recommendations as to labor laws and social security, including the National Labor Relations Act, the House made its contribution to an informed public opinion, as to these matters which so vitally affect the welfare of the average citizen. The Committee on the Bill of Rights was enlarged and supported, and comprehensive studies were authorized to obtain more complete facts as to the economic condition of the lawyers. A bill to limit "mail-order divorces" was approved for introduction in the Congress. Members of the House were acquainted with the facts as to the troublesome problems inherent in the law lists, which are certain to receive further consideration at future sessions of the House. Approval in principle was voted for the Ashurst bill to create an administrative office of the Courts of the United States. A great deal of business was dispatched, which otherwise would have congested the calendars of the San Francisco meeting next July.

President Hogan's message on "the state of the Association," at the opening session of the House, should be read by every member of the Association. His announcement of "a new all-time high" in membership was most encouraging. His discussion of some of the problems confronting the Association leadership was frank and sincere.

The practical value of the "parliamentary system" which is basic in the present structure of the Association and the House was again demonstrated, in that all officers, members of the Board of Governors, Section Chairmen, and Chairmen of Committees making reports at this meeting, were continuously present in the policy-determining body of the Association, were able to explain and justify what they had been doing, and were benefited and guided by the open exchange of views and their own

manifest accountability to the representative House.

THE AMERICAN BAR ASSOCIATION AND INTERNATIONAL RELATIONS

An unforeseen development in the government of the American Bar Association by a representative body of delegates from all parts of the country, is the increasing reluctance of the House of Delegates to declare opinions upon questions of international relations, particularly where the acts or policies of foreign governments are concerned. This stems in part from an awareness of the heightened delicacy and difficulty of the foreign policy of a democratic government in a world so largely totalitarian; but the House would hardly be silent or hesitant upon issues which profoundly affect liberty and justice throughout civilization, were it not for sincere doubts as to the scope of the powers and duties thus far entrusted to the House of Delegates.

The Constitution of the Association states its "object" to be (Article I):

"This Association shall be known as the AMERICAN BAR ASSOCIATION. Its objects shall be to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation and of judicial decision throughout the Nation, uphold the honor of the profession of the law, encourage cordial intercourse among the members of the American Bar, and to correlate the activities of the Bar organizations of the respective States on a representative basis in the interest of the legal profession and of the public throughout the United States."

Only the latter part of this statement is new; the 1936 revision added the provisions as to correlating "the activities of the Bar organizations of the respective States," etc., but did not amend the basic statement of purpose, which has stood as it is for many years, practically from the founding of the Association. For many years, the Association had a Committee on International Law, more recently transformed into a Section of International and Comparative Law; but the scope of the authorized activities of that Section is indicated only in its By-laws, approved by the House of Delegates.

By those who challenge the present authority of the Association to declare views as to international relations, particularly as to the acts and policies of other governments, the phrases "throughout the Nation," "throughout the United States," etc., in Article I of the Association's Constitution, and the absence of any reference to international relationships, are deemed to be limiting and are said to be in no way broadened by the provision of the By-laws of the Section of International Law, quoted elsewhere in this issue. No question is raised as to the right and duty of the Association to concern itself with international law, as a part of "the science of jurisprudence,' and with the advancement of adjudication or arbitration of controversies according to law, at least where not directed at the domestic policy of a particular foreign government; but avowals as to events in other lands are viewed as in a different category. It is said also that relatively few of the State and local Bar Associations concern themselves with international affairs; that the delegates consequently have no instructions or consensus of opinion from their constituencies, as to such matters; and that a representative American institution such as the House of Delegates will wisely concern itself with the problems of our own country in the field of law and refrain from interjecting its views of the acts of foreign governments.

The disposition manifest in the House at its recent sessions was not making its first appearance. In Cleveland last July, resolutions emanating from the Section, as to the reduction of commercial barriers between nations, the convening of an international conference for peace, the peaceful settlement of international disputes according to due process of law, and the policy of the State Department as to the protection of the persons and property of American citizens abroad, were defeated or tabled by the House. Developments along similar lines at the recent mid-winter meeting are reported elsewhere in this issue.

All this represents a substantial departure from the traditional disposition of the Association to speak boldly, when the course of events in world affairs presented major issues affecting liberty and law. Older members of the Association will recall the stirring grounds on which, in September of 1917, Elihu Root presented resolutions as to war with Germany. Speaking for an Executive Committee then headed by George Sutherland of Utah as President, Mr. Root chose not to base his resolution on the entry of the United States into the War but on broader grounds as to the right and duty of lawyers to speak as to world issues. His eloquent words will never be forgotten nor disregarded by those who heard them; and they have vitality today. "It is plain to the thoughtful observer," said Mr. Root,

"that at bottom the world conflict is between two opposing principles of organization of civil society. It is between the principle of government by divine right

with the subordination of individual liberty to the forces that maintain autocracy, and the principle of individual liberty, with the organization of government for the preservation of that liberty upon the basis of popular authority. The conflict is the result of forces mightier than the will of any Nation, which in the providence of God have brought this people to the point where once again they are required to fight, at the sacrifice of comfort and ease and property and life, for the institutions that they cherish, for the liberty they are determined to maintain, and for the justice which they hope to hand down to their children. And your Committee feel that at the outset of these proceedings the representatives of the American Bar should speak regarding their attitude toward this conflict with no uncertain sound—should speak as men who have all their lives been standing for justice and maintaining law and liberty."

Amendment of the Constitution of the Association specifically to empower the House in proper cases to declare its views as to international affairs, seems likely to be considered by those whose concept of the province of the American lawyers is that expressed by Mr. Root more than twenty years ago.

MR. JUSTICE FRANKFURTER

The President of the United States has appointed, and the Senate of the United States has confirmed without recorded opposition, Professor Felix Frankfurter, of the Harvard Law School, as successor to Mr. Justice Benjamin N. Cardozo as an Associate Justice of the Supreme Court of the United States.

This selection brings to membership in the great Court a brilliant teacher of law who has for some years been the foremost student and analyst of the work of the Court, and who has also been an outstanding exponent of the legal philosophy represented in the Court by his revered and beloved friends, the late Mr. Justice Holmes and the late Mr. Justice Cardozo. The new Associate Justice has also had extensive experience in the field of administrative law, as well as in the tasks of briefing and advocacy in notable causes, and also rare opportunities for observing at first hand the problems of government as affected by the trends of judicial decision.

The appropriateness of his accession to a bench which in recent years has lost Holmes and Cardozo seems to have been widely recognized by the country. The felicitations and best wishes of American lawyers go to the new Associate Justice, as he ascends the bench and enters into the work of the Court.

HERMAN OLIPHANT

Members of the Association and particularly of its Board of Editors noted with deep regret the passing of Herman Oliphant, General Counsel of the Treasury, former teacher of law, and keen student of the relation of law to economic and fiscal problems.

Mr. Oliphant was a member of the original Board of Editors of the Journal, in its monthly form. He rendered invaluable service during the early formative period of the publication, as well as for many years later. His deep scholarship, his wide contact with outstanding legal scholars, and his profound interest in the history, growth and development of the law, enabled him to make a specially important contribution as one of the Board of Editors. It was during this period that he emerged as one of the country's outstanding teachers of law and research students of the history and operation of the common law in action.

He was called from the University of Chicago to a chair in Columbia University Law School, and later was one of a select group who inaugurated and for a while conducted the Institute of Law at Johns Hopkins University. The growth of administrative law naturally attracted his interest and attention, and this theoretical interest was transferred to the field of action when he became General Counsel to the Treasury—a position he held when the final summons came. He soon found that the increasing demands of this office left him no time to continue his services to the JOURNAL; and a few years ago, to the great regret of his fellow-members of the Board, he presented his resignation.

He was a scholar who gave the limit of his time, strength and great ability to the many tasks which were delegated to his facile mind. Nature tragically took its toll all too soon, and he was stricken down at maturity. His influence upon the laws and policies of his time was considerable; and the debt owed to him and his memory by the American Bar Association is here recorded, by those who worked closely with him during the years of his service to the JOURNAL.

BINDER FOR JOURNAL

The JOURNAL is prepared to furnish a neat and serviceable binder for current numbers to members for $1.50. The price is merely manufacturer's cost plus expense of packing, mailing, insurance, etc. The binder has back of art buckram, with the name "American Bar Association Journal" stamped on it in gilt letters. Please send check with order to JOURNAL office, 1140 N. Dearborn St., Chicago, Ill.

G. DEXTER BLOUNT, DENVER, COL.
BOARD OF GOVERNORS, TENTH CIRCUIT

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NOMINATED FOR PRESIDENT

PHILIP J. WICKSER, BUFFALO, N. Y.
BOARD OF GOVERNORS, SECOND CIRCUIT

GEORGE R. GRANT, BOSTON, MASS.
BOARD OF GOVERNORS, FIRST CIRCUIT

NOMINATED BY STATE DELEGATES FOR OFFICERS OF THE ASSOCIATION, 1939-40

(Sketches and Photographs of Hon. Thomas B. Gay, Renominated for Chairman of the House of Delegates, and of Treasurer John H. Voorhees and Secretary Harry S. Knight, Renominated Respectively for Those Offices, Have Appeared in Previous Issues of the JOURNAL)

Sketches of Nominees

CHARLES A. BEARDSLEY

Charles A. Beardsley, nominated for President of the American Bar Association, is well known to the profession not only as a leading lawyer but also as an outstanding advocate of Bar integration. He has been greatly in demand as a speaker on this subject and has addressed many State Bar Associations in behalf of the plan.

He has been engaged in Bar Association activities—State and National—for many years. He was a Vice President and member of the Executive Committee of the California Bar Association—the voluntary association—shortly prior to the organization of the State Bar of California—the present statutory integrated bar. In 1927 he was appointed by the Chief Justice of the California Supreme Court as a member of the State Bar commission charged with the responsibility of organizing the new statutory bar under the terms of the State Bar Act passed by the 1927 Legislature. He became a member of the first Board of Governors of the statutory bar in 1927, representing the State-at-large, in which capacity he served for the next three years. During the last of this three year period (1929-1930) he was the President of the State Bar of California. Since completion of his term as President in 1930, he has continued his activity with the State Bar and has filled numerous assignments.

Commencing with the annual meeting at Seattle in 1928, he has attended every annual meeting of the American Bar Association and has been prominent in its councils. He became a member of the General Council at the Chicago meeting in 1930 and later served as Vice President representing the Ninth Judicial Circuit. He was a member of the Unauthorized Practice Committee when it was first organized and served for two years. He has also served as a member of other committees of the American Bar Association, as well as on the Council of the Conference of Bar Association Delegates. At present he is Chairman of the Special Committee on Ways and Means. He became a member of the Executive Committee in 1934, completing his three-year term as a member of the Board of Governors at the Kansas City meeting in 1937.

During the last nine years he has been a guest speaker at various State and local bar association meetings throughout the country, including meetings of the State Associations in Washington (State), Oregon, Nevada, Utah, Missouri and Texas, and including local bar associations in Chicago, Denver, Kansas City, St. Louis, Detroit and Ann Arbor.

He holds a commission as Lieutenant Commander of the United States Naval Reserve assigned to the quota of the Judge Advocate General for special legal service. In this capacity he took a course in International Law with the Naval War College in 1932-33, and has been actively engaged in naval activities in the Twelfth Naval District. In 1938 he gave a course of lectures on International Law at the United States Naval Reserve Officers' Pool, organized and carried on by the Navy Department, Twelfth Naval District, at the Naval Station on Yerba Buena Island, San Francisco Bay.

Mr. Beardsley was born at Townville, Pennsylvania, January 14, 1882. He moved to California in 1892, where he has since resided. He was educated in Pennsylvania and California public schools and at Stanford University, where he received the degree of A. B. in 1906 and of J. D. in 1908. He began practice of law in Oakland, California, June 1, 1908, as Associate of the firm of Fitzgerald & Abbott. On January 1, 1913, he became a member of the firm of Fitzgerald, Abbott & Beardsley, of which firm he has been the senior member since January, 1934. During the last eight years he has been identified with the Stanford Law School as a non-resident Lecturer of Law.

GEORGE RICHARD GRANT

George Richard Grant was nominated as a member of the Board of Governors at Chicago on January 10.

Mr. Grant was born at Cape Vincent, Jefferson County, New York, November 16, 1882, educated in the public schools, Cornell University, and the University of Buffalo. He practiced law in Buffalo for a number of years, and then became Assistant Counsel for the Public Service Commission for the Second District of New York, at Albany. In 1913 he became attorney for the Eastern Group of Bell Telephone Companies, and in 1917 he became General Attorney for the New England Telephone and Telegraph Company and subsidiaries in the New England States, a position which he now holds. His office is at 50 Oliver Street, Boston, Massachusetts.

He is past president of the Cornell Club of New England, and a former member of the Executive Committee of the Cornell Law Association. He is a member of the Massachusetts Bar Association, the Bar Association of the City of Boston, and the Massachusetts Law Society.

He joined the American Bar Association in 1917, where he has worked continuously in the Section of Public Utility Law, becoming its Chairman in 1936. He was a member of the General Council of the Association and in 1936 became State Delegate for Massachusetts.

Mr. Grant lives at Wellesley Hills, and has two sons, George Richard Grant, Jr., and Francis Howard Grant.

PHILIP J. WICKSER

Philip J. Wickser was born in Buffalo, N. Y., in 1887, and was educated in the public schools of that city, at Cornell University and the Harvard Law School. He began practice in his native city and has continued in general practice there up to the present time. Aside from the law, his chief interest is in fire insurance, and he is Chairman of the Board of the Buffalo Fire Insurance Co., an old-line company founded in 1867.

He has served on the Executive Committee of the New York State Bar Association and is a member of its Committee on Cooperation Between State and Local Associations, Federations and the American Bar Association. He has always had a great interest in legal education and has been Secretary and Treasurer of the New York State Board of Law Examiners since 1921, and he was the first Chairman of the National Conference of Bar Examiners, in 1931. He has written a number of monographs, principally concerning the profession, one of these being an article tracing the development and history of Bar Associations.

In social work he has served on the boards of a variety of societies. In 1931, upon the appointment of Governor Roosevelt, he served on the First "Temporary Emergency Relief Administration" (of New

York) in this country as its Secretary, under the chairmanship of the late Jesse Isidor Straus, whom he succeeded as Chairman in 1932. Thereafter, from 1934 to 1936, he served as Vice-Chairman (New York) of the Governor's Commission on Unemployment Relief which surveyed that field for report and recommendation to Governor Lehman.

G. DEXTER BLOUNT

G. Dexter Blount, nominee for the Board of Governors from the Tenth Circuit, was born in Live Oak, Florida, February 16, 1881. He received a B. Ph. degree at Emory University in 1901, his LL. B. degree at the University of Georgia in 1903, and at Yale in 1904. He was admitted to the Georgia bar in 1904 and practiced in Savannah for two years, after which he moved to Denver, Colorado, where he was admitted to the bar in 1907. Several years later he became a partner in the firm of Bicksler, Bennett, Dana & Blount, and his subsequent firm connections were as follows: Dana & Blount, 1912-18; Dana, Blount & Silverstein, 1918-29; Blount, Silverstein & Rosner, 1929-37; and Blount & Silverstein, 1937-39. He has recently organized a new firm called Blount, January and Yegge, with offices in the Equitable Building, Denver. Mr. Blount was Captain of Artillery in the World War. He was a member of the General Council of the American Bar Association, 1934-36, and State Delegate from Colorado, 1936-39. He has been active in the Colorado Bar Association and last September was elected President of that organization. He is also a member of the Denver Bar Association, the Commercial Law League of America, of which he was President 1935-36, the International Association of Insurance Counsel, Kappa Alpha, and Phi Delta Phi.

CARL V. ESSERY

Carl V. Essery, of Detroit, Michigan, nominated for member of the Board of Governors for the Sixth Circuit, was born in Michigan on January 4, 1886. He attended the public schools of Manchester, Michigan, followed by graduation from the University of Michigan with A. B. degree in 1910 and Juris Doctor degree in 1912. He was admitted to the Michigan Bar in 1912 and has since practiced law in Detroit with the exception of the war period during which he served as Lieutenant Junior Grade in the United States Navy. He is a member of the firm of Hill, Hamblem, Essery & Lewis.

He is a past President of the Michigan State Bar Association. In the American Bar Association he has been a member of the General Council, of the Admiralty Committee, Chairman of the Committee on Draft, Chairman of the Section of Bar Organization Activities and delegate of the State Bar of Michigan. He is at present the delegate of the Detroit Bar Association.

Mr. Essery is past Vice President of the American Judicature Society and is a member of the American Law Institute. He is a member of the Executive Committee of the Maritime Law Association of the United States. He has delivered addresses to state and local associations and has written several articles on bar association work.

[We regret that no photograph of Mr. Essery was available for publication in this issue—Editor.]

Sketches of officials renominated have been printed in previous issues of the JOURNAL: Thomas B. Gay, Chairman of the House of Delegates, June, 1938, p. 486; Secretary Harry S. Knight, Feb., 1937, p. 139; Treasurer John H. Voorhees, Feb., 1937, p. 139.

SUMMARY OF REPORT OF SPECIAL COMMITTEE ON LAW LISTS

THE Special Committee on Law Lists convened at Chicago and made report to the Board of Governors and to the House of Delegates of the American Bar Association on January 7 and 9, 1939. In connection with its approval of the committee's report the Board of Governors adopted the following resolution which was transmitted, with the report and its action thereon, to the House of Delegates where both were approved:

"Be It Resolved, That the Special Committee on Law Lists be authorized, empowered and directed further to investigate as may be necessary, in the enforcement of the Rules and Standards, at the expense of the applicants, all applications for approval that have been granted or hereafter may be investigated for approval, and that the general expenses of the Committee, as such, be borne by the Association, in an amount to be appropriated by the Budget Committee."

The report presented an outline of the committee's activities since its report to the Association at the annual meeting at Cleveland in July, 1938. It contained, among other things, the roster of law lists conditionally approved as of July 29, 1938 (published in A. B. A. Journal, August, 1938, p. 681), the roster of lists finally approved as of November 26, 1938, together with other informative matter touched upon in article in the January, 1939, issue of the Journal, pp. 13-27, and the following epitomization of the committee's appropriations, receipts and expenses to date of December 15, 1938:

Present Committee's Appropriations for Associational Year 1937-38:		
October 2, 1937	$ 2,500.00	
December 14, 1937	7,500.00	
Present Committee's Expenses for Associational Year 1937-38:		
Total expenses to June 30, 1938		$ 9,109.88
Unexpended and lapsed balance of appropriations for 1937-38		890.12
	$10,000.00	$10,000.00
Appropriation, 1938-39:		
Appropriation for year 1938-39	$17,500.00	
Expenses July 1, 1938 to December 15, 1938		$ 6,596.96
Balance of appropriation on hand December 15, 1938		10,903.04
	$17,500.00	$17,500.00
Receipts from Applications for Approval of Law Lists:		
For year ending June 30, 1938	$18,199.30	
From July 1, 1938 to Dec. 15, 1938	1,498.78	
Total receipts to Dec. 15, 1938	$19,698.08	
Expenses of Present Committee:		
For year ending June 30, 1938 (supra)		$ 9,109.88
From July 1, 1938 to Dec. 15, 1938 (supra)		6,596.96
Total expenses to December 15, 1938		$15,706.84
Balance collected and unexpended to December 15, 1938		3,991.24
	$19,698.08	$19,698.08

The resolution hereinabove quoted recognizes the present need for continued investigation and supervision by the Association of law lists after they have been approved, as well as during the pendency of applications for approval. Moreover, the Association's

interest, authority and control in matters pertaining to law lists is manifested not only in its practice of making appropriations in advance of each associational year sufficient to meet all estimated expenses of the entire work, but also, in its assumption, to the extent indicated, of a substantial part of that expense.

The future work of the committee was also suggested in the report. Due publicity will, from time to time, be given to this and other features of the committee's work. In the meanwhile, inquiries pertaining thereto addressed to Martin J. Teigan, Secretary, 209 South La Salle St., Chicago, Illinois, will be given prompt attention.

Since the January, 1939, issue of the Journal the following additional law lists have been approved:

Corporation Lawyers Directory, 630 Fifth Avenue, New York City, New York.

Insurance Claim Who's Who, 175 W. Jackson Blvd., Chicago, Illinois.

Officers and Council of Junior Bar Conference Hold Meeting in Chicago

THE officers and Council of the Junior Bar Conference met on January 7th and 8th, 1939, at the Edgewater Beach Hotel, Chicago, Illinois, for four sessions during which a long list of agenda was considered. Most of the Council members had made stop-overs en route which proved eminently successful in stirring interest in States which had been dormant theretofore. Each Council Member presented the progress being made in Conference work within the States in his circuit. It was apparent that many new States have been added to those already active in Conference work. It was the consensus of opinion that with organizational activities consuming a large part of the time up to now, that the next few months would show many accomplishments in all phases of the Conference program, and more particularly the Public Information program. Reports were given for each of the Conference committees and for the Public Information Director.

New matters placed before the Council for consideration included a proposed amendment sponsored by Chairman Ronald J. Foulis, St. Louis, Missouri, to extend the terms of State officers to a fixed date in September so that Conference activity should not be impaired due to changes in administration. This subject was referred to a sub-committee of the Council for report at the San Francisco meeting. Projects involving Conference support to legal aid surveys and combating "loan shark" evils were also presented and referred to the officers for further study.

Discussion of plans for the annual meeting at San Francisco was led by Charles E. Pledger, Jr., Washington, D. C.

Junior Bar Conference officers and council: (left to right) Guy Tobler, Hackensack, N. J.; Harold W. Schweitzer, Los Angeles, Calif.; Paul F. Hannah, Vice-Chairman, Washington, D. C.; Charles E. Pledger, Jr., Washington, D. C.; Lewis F. Powell, Jr., Richmond, Va.; Joseph Harrison, Secretary, Newark, N. J.; Ronald J. Foulis, Chairman, St. Louis, Mo.; Weston Vernon, Jr., last retiring Chairman, New York, N. Y.; Ralph E. Langdell, Manchester, N. H.; Earl F. Morris, Columbus, Ohio; A. Pratt Kesler, Salt Lake City, Utah; H. Howard Cockrill, Little Rock, Ark.; and Peyton Bibb, Birmingham, Ala.

REVIEW OF RECENT SUPREME COURT DECISIONS

Assumption of Risk as Defense in Action by Seaman to Recover for Injuries—Right of National Labor Relations Board, under National Labor Relations Act, to Withdraw Petition for Enforcement of Board Order from Circuit Court of Appeals not absolute but Discretionary with Court—Railroad Reorganizations under Section 77 of Bankruptcy Act—Claims for Future Rent for Rejection of Lease—Washington Privilege Tax on Gross Receipts Invalid as to Receipts from Interstate Business—Power of Interstate Commerce Commission to Prohibit Storage-in-Transit Practices—Summaries of Decisions in Other Cases

By Edgar Bronson Tolman*

Jones Act—Assumption of Risk As Defense in Action by Seaman to Recover for Injuries

Assumption of risk is not a defense to an action brought by a seaman under the Jones Act to recover for injuries resulting from his use of a defective appliance on the ship, in the course of his duty, although he chose to use the unsafe appliance instead of a safe method of work, which was known to him. His negligence in this regard, however, should be considered by the jury in mitigation of damages.

Socony-Vacuum Oil Co. Inc., v. Herbert A. Smith, Jr., 83 Adv. Op. 261; 59 Sup. Ct. Rep. 262.

The question for decision in this case was whether assumption of risk is a defense in a suit under the Jones Act brought by a seaman to recover for injuries resulting from his use of a defective appliance, when he chose to use the unsafe appliance instead of a safe method of doing his work, which was known to him.

The injury was sustained in a fall in the engine room of the petitioner's vessel, caused by a defective step on which the respondent, a seaman, stood when on duty, while seeking to learn, by touching with his finger, whether an engine bearing was overheated. On the trial before a jury in a federal court the trial judge applied the admiralty rule of comparative negligence, and refused petitioner's request to instruct that if the respondent could have performed his duty without use of the defective step, he assumed the risk of injury. On the contrary, the trial judge charged that there was no assumption of risk by the seaman where the shipowner failed in its duty to furnish a safe appliance. A judgment was entered on a verdict for the seaman, which was affirmed by the Circuit Court of Appeals.

There was evidence by petitioner's witnesses, which respondent denied, from which the jury could have found that it was possible for the respondent to do his work without use of the defective step, and that respondent knew of the defect and had reported it.

On certiorari the judgment was affirmed by the Supreme Court in an opinion by Mr. Justice Stone, who notes that the question is a novel one in that Court. He first discusses the earlier decisions in admiralty, wherein the doctrine of assumption of risk had not obtained, but wherein contributory negligence was ground for mitigation of damages rather than a bar to recovery. Attention is called also to the strict discipline of the sea and other factors which have induced the admiralty courts to avoid application of rules of common law which would affect seamen harshly, because of the special circumstances attending their calling.

The conclusion is reached that it is more consistent with the doctrine of comparative negligence, prevailing in admiralty, to rule out the defense of assumption of risk, even in cases where the seaman has a choice of a safe method of work. This view is elaborated in the opinion, as follows:

"Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages. There being no defense of assumption of risk where the seaman is without opportunity to use a safe appliance, it seems plain that his choice of a defective instead of a safe one, resulting in injury, does not differ in either the quality of the act or in its injurious consequences, in any practical way, from his correspondingly negligent use of a safe or an unsafe appliance, where its use has contributed to an injury resulting from a breach of duty by the owner. . . In either case the seaman's negligence is a contributing cause of his injury, without which the ship owner would be liable to the full extent of the damage.

"The incongruity and practical embarrassments in the application of a rule that the negligence in the one case bars recovery, while that in the other only reduces the recoverable damages, are evident. The common law is consistent in holding that both contributory negligence and assumption of risk are defenses. But other conisderations apart, it seems inconsistent, and an impracticable refinement, to apply the rule for which petitioner contends in a system of law which maintains the comparative negligence rule to the fullest extent. This was recognized in *Olson* v. *Flavel*, [34 Fed. 477], and *The Julia Fowler*, [49 Fed. 277], where the choice by the seaman of an unsafe appliance was held not to bar recovery but to be a proper basis for a substantial reduction of damages because of the negligence of the choice. In *The Julia Fowler, supra*, the eminent admiralty judge, Addison Brown, held that a seaman who had suffered injury through the deliberate use of a halliard known to be defectively spliced when a sound rope was available was entitled to recover, but with diminution of damages because of his negligence in using the unsafe rope.

"We think that the consistent development of the maritime law in conformity to its traditional policy of

*Assisted by James L. Homire and Leland L. Tolman.

affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman who makes use of a defective appliance knowing that a safe one is available. The power of the trial judge to guide and instruct the jury and his control over excessive verdicts afford as adequate a protection to owners as in any other case where the negligence of the seaman, whatever its degree, has contributed to an actionable injury."

The Court reserved the question as to what rule controls where the seaman elects an unsafe appliance in disobedience of orders or while off duty.

MR. JUSTICE MCREYNOLDS was for reversal of the judgment on the ground that the charge as to assumption of risk should have been given.

MR. JUSTICE ROBERTS did not participate.

The case was argued by Mr. Louis Mead Treadwell for the petitioner, and by Mr. George J. Engelman for the respondent.

National Labor Relations Act—Provisions for Enforcement and Review of Order of Labor Board

Under the National Labor Relations Act, the right of the National Labor Relations Board to withdraw from the Circuit Court of Appeals a petition filed therein for enforcement of an order of the Board is not absolute, but is discretionary with the Court. Where the order is open to serious charges as to its validity, it is a proper exercise of discretion for the Court to permit a withdrawal of the petition for enforcement on the motion of the Board, where the Board states that it seeks withdrawal and remand for the purpose of setting aside its findings and order and issuing proposed findings and a new order on a reconsideration of the entire case.

Ford Motor Co. v. National Labor Relations Board, 83 Adv. Op. 229; 59 Sup. Ct. Rep. 301.

December 22, 1937, the National Labor Relations Board entered an order against petitioner directing it to cease and desist from certain practices and to offer reinstatement, with back pay, to certain discharged employees. The Board then filed a petition (in No. 182) in the Circuit Court of Appeals seeking enforcement of its order, and filed a transcript of its proceedings.

April 4, 1938, petitioner asked leave to adduce additional evidence, and April 11, 1938, filed answer to the Board's petition, alleging invalidity of the order because of the Board's failure to give a full and fair hearing, and because it had not itself considered the evidence, but had adopted as its own a decision prepared by subordinates without affording petitioner an opportunity to be heard thereon. It alleged also that the findings were not supported by evidence.

May 2, 1938, shortly after Supreme Court's decision in *Morgan v. United States*, 304 U. S. 1, the Board moved to withdraw its petition for enforcement, without prejudice, stating that it would set aside its order, issued proposed findings, with permission to parties to file exceptions and make argument, and thereafter make its decision and order.

Meanwhile, on May 4, 1938, the petitioner filed in the Circuit Court of Appeals its petition to set aside the Board's order of December 22, 1937. But on May 5, 1937, the Circuit Court granted the Board's motion to withdraw its petition for enforcement. Finally, after various motions on the part of both the Board and the petitioner, the Circuit Court on June 10, 1938, granted the Board's motion—

"to remand this cause to the National Labor Relations Board for the purpose of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case."

Both parties obtained writs of certiorari, but after hearing the petitioner's (i. e., Ford Motor Company's) writ, in No. 182, was dismissed, and the order of June 10, 1938, involved in No. 183, remanding the cause to the Board, was affirmed. MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

In approaching decision of the question presented the provisions of Section 10(e) and Section 10(f) of the National Labor Relations Act providing for enforcement proceedings on petition of the Board and for review by an aggrieved party are cited and discussed. Reviewing these provisions, the Court concludes that the Board's right to withdraw its petition is not absolute, but is discretionary with the Circuit Court, and states:

"While Section 10(f) assures to any aggrieved person opportunity to contest the Board's order, it does not require an unnecessary duplication of proceedings. The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review. Where the Board has petitioned for enforcement under Section 10(e) and the jurisdiction of the court has attached, no separate proceeding is needed on the part of the person thus brought into the court. The breadth of the jurisdiction conferred upon the court to set aside or modify in whole or in part the Board's order, or to permit new evidence to be taken, necessarily implies that the party proceeded against is entitled to raise all pertinent questions and to obtain any affirmative relief that is appropriate. Here, petitioner in the Board's proceeding had sought affirmative relief and had taken steps to establish that right. Considering the scope and purpose of the jurisdiction of the court in a proceeding under Section 10(e), and the position and rights of the person proceeded against, we are unable to conclude that the Board has an absolute right to withdraw its petition at its pleasure. We think that permission to withdraw must rest in the sound discretion of the court to be exercised in the light of the circumstances of the particular case."

An examination of the proceedings under review showed that the two proceedings, i. e., the Board's petition and the employer's petition were essentially one, so far as the validity of the order was involved. Consequently the controversy was reduced to narrow compass, namely, whether the Circuit Court, instead of setting aside the findings and order, erred in permitting the Board to do so. Concluding that this was not error, MR. CHIEF JUSTICE HUGHES says:

"The present controversy thus comes to the narrow point that instead of setting aside the Board's findings and order, the court has allowed the Board itself to set them aside. The contention on that ground is without substance. In either event the findings and order are vacated. Petitioner's objection to the order because of lack of due hearing results in the abandonment of the findings and order and petitioner will thus be completely freed from any determination they contain or any obligation they impose.

"Petitioner says that the Board has not confessed error. This is immaterial if the assailed findings and order are set aside. Nor is it important that the court has not held the findings and order to be void. It is elementary that the court is not bound to determine questions which have become academic.

"There is nothing in the statute, or in the principles governing judicial review of administrative action, which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its record, or making additional findings where these are

necessary, or supplying findings validly made in the place of those attacked as invalid. The application for remand in this instance was not on frivolous grounds or for any purpose that might be considered dilatory or vexatious. Petitioner had raised a serious question as to the validity of the findings and order. The Board properly recognized the gravity of the contention and sought to meet it by voluntarily doing what the court could have compelled. That was in the interest of a prompt disposition, and whatever delay has resulted is due to petitioner's resistance to that course."

MR. JUSTICE ROBERTS took no part in this case.

The case was argued by Mr. Alfred MacCormack for the petitioner, and by Mr. Charles Fahy for the respondent.

Bankruptcy—Railroad Reorganizations Under Section 77—Claims for Future Rent for Rejection of Lease

Under Section 77 of the Bankruptcy Act, providing for the reorganization of railroads, a lessor of a railroad has a provable claim against the lessee's estate for rejection of a lease.

In such cases the lessor is declared by the Act to be a creditor of the lessee's estate "to the extent of the actual damage or injury detrmined in accordance with principles obtaining in equity proceedings." Under such provision, it is error to limit the lessor's damages to the difference between the earnings of the leased property and the rent reserved up to the latest practicable date in the reorganization proceedings, since such measure of damages is not a measure of the "actual" damage within the meaning of the statute.

Connecticut Ry. and Lighting Co. v. Palmer et al., 83 Adv. Op. 268; 59 Sup. Ct. Rep. 316.

The question involved in this case concerns the correct measure of damages to be allowed a lessor as creditor of a railroad debtor for rejection of a lease in reorganization proceedings under Section 77 of the Bankruptcy Act.

The lease in question was for a term of 999 years, and gave the lessor right to repossess on default, "without prejudice to its right of action for arrears of rent or breach of covenant." It contained no provision for liquidation of damages for breach of the entire lease.

The New York, New Haven and Hartford Railroad Company filed a petition under Section 77 of the Bankruptcy Act in October, 1935, and in the following December rejected the lease in question. The Connecticut Railway and Lighting Company, lessor, filed claim against the New Haven estate for numerous items, including damages for breach of the lease, claiming something over $23,000,000 for rejection of the lease. This claim was advanced as "the difference between the present worth of the rent and of the rental value for the balance of the term of the lease, liquidated by discounting at 4%."

The District Court allowed damages measured by the difference between the rent reserved in the lease and the net earnings of the property. It allowed the amount proved up to June 20, 1937, with leave to the lessor to apply for further hearings to liquidate damages suffered after that date. The Circuit Court of Appeals approved the trial court's exclusion of any future damages which had not accrued up to the latest possible hearing in the proceedings.

On certiorari, the Supreme Court, in an opinion by MR. JUSTICE REED, reversed the order on the ground that effect had not been given to the provisions of Section 77 of the Bankruptcy Act allowing damages in such cases. The opinion, as a preliminary phase, discusses the difficulties under the earlier bankruptcy practice whereby a claim for future rent was not provable, though a claim for damages was provable where resultant upon a covenant creating liability on the filing of a bankruptcy petition. These aspects, the inequalities consequent thereon, and the impediments they offered to the rehabilitation of the debtors are then described in the following portion of the opinion:

"Under the Bankruptcy Act, prior to the amendment of Section 63(a) by the Act of June 7, 1934, a claim for future rent was not provable. A covenant, however, creating a liability for damages on the filing of a petition in bankruptcy, measured by the difference between the present fair value of the remaining rent and the present fair rental value of the premises for the balance of the term, resulted in a provable claim. This condition made for inequality among both creditors and bankrupts, since recovery by claimants depended upon the artistry with which their leases were drafted and discharged bankrupts were often left with surviving claims for rent, unduly burdensome upon their efforts at self-rehabilitation. Everyone interested in bankruptcy problems had long been familiar with the future rent situation and its ramifications into the fields of anticipatory breach of executory contracts and the provability of contingent claims."

The enactments of Congress, following the depression, dealing with the problem of landlords' claims in bankruptcy are then cited. Those controlling here are contained in Section 77 of the Bankruptcy Act and read as follows:

"Sec. 77. Reorganization of railroads . . . (b) . . . The term 'creditors' shall include . . . the holder of a claim under a contract executory in whole or in part including an unexpired lease.

". . . In case an executory contract or unexpired lease of property shall be rejected . . . any person injured by such non-adoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. . . .

"(f) . . . The property dealt with by the plan, when transferred and conveyed . . . shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities . . ."

Attention is then addressed to recent provisions of the Bankruptcy Act to promote the rehabilitation of debtors. Such provisions include those enacted to make claims for future rents provable and dischargeable, and to limit the recovery to one year under Section 4 and to three years under Section 1 [77B(b)], of the Act of June 7, 1934. The failure to provide an exact measure in railroad reorganizations is deemed to show that it was not considered appropriate in such cases.

Turning then to the relevant provisions of Section 77, the Court discusses the contentions of the debtor, the ruling of the District and Circuit Courts and, in conclusion, states its view as to the correct construction of the Act. In this connection MR. JUSTICE REED says:

"We cannot read a limitation on damages into the language as enacted. As reorganizations had been traditionally carried on in equity and would be carried on in a bankruptcy court with equity powers, it was natural to add the clause as to equitable proceedings. Leases were placed upon the same basis as executory contracts.

"The New Haven urges that the reference to 'equitable proceedings' is to receiverships in equity, as such receiverships were mentioned twice in the same subsection. The use of 'equitable proceedings' instead of 'equity receiv-

erships' supports the view that something different was intended. The equitable principle for the allowance of claims for future rent the New Haven finds in *Pennsylvania Steel Company v. New York City Railway Company*, 198 Fed. 721, expressed as follows, pages 741-742,

" 'Claims which when presented within the time limited by the court for their presentation are certain or are capable of being made certain by recognized methods of computation, should be allowed. Claims which are not then certain should be disallowed because they afford no basis for making dividends.'

"The conclusion of the District Court, as affirmed by the Circuit Court of Appeals, is then offered as the correct rule in this case. That conclusion was summarized by the brief of the New Haven in these words:

" 'The court thereupon held that damages measured by the difference between the rent reserved and the earnings of the property up to the date of hearing should be allowed, with the further right to the claimant, in common with all other claimants under rejected leases, to apply for a subsequent hearing at the latest practicable date to be determined by the court during the reorganization proceedings for the purpose of proving similar damages up to that date. Damages for loss of rent which fell due after the latest practicable date for filing claims were thus barred from proof, and under the quoted language of subdivision (f), the right to recover for such injury from the debtor after reorganization was destroyed,

"We are of the opinion that this construction of the statutory provisions for the measurement of damages for loss of future rent is erroneous. Notwithstanding its extended term, the lease created an obligation under the present Bankruptcy Act upon the New Haven entitled to share in its assets upon reorganization on an equality with the claims of other creditors.

"While it could be said that the general rule in equity receiverships was that only accrued damages could be proven, there was no discernible equitable rule for the determination of damages for rejection or nonadoption of an unexpired lease. The actual damages from the breach were not determined. At the most an arbitrary time limit was set on proof. The reference to equity proceedings does not, in our opinion, refer to any rule for the measure of damages in equity receiverships. In their administration of estates, whether railroad or non-railroad, claims for future rents depended for their provability upon the fact of reentry, the existence of a clause for indemnity in case of breach, or the incidence of the maturity of the rent claim under the local law.

"The damages recovered by an injured party have always been limited to his 'actual' damages. There is nothing to indicate that the Congress intended to have 'actual' interpreted as 'accrued'. The measure of damages applied by the courts for the breach of the lease, where damages are permitted, is uniform. In *William Filene's Sons Co. v. Weed* and in *Kuehner v. Irving Trust Co.*, this Court said in analagous situations that the measure was the present value of the rent reserved less the present rental value of the remainder of the term. The English Bankruptcy Act permits proof of future rents, as any claim is provable which is 'as to mode of valuation, capable of being ascertained by fixed rules or as matter of opinion.' The measure of damages is the same. The difficulties of proof are well recognized. The same rules apply to executory contracts. In *Kuehner v. Irving Trust Co.* this Court pointed out as one of the reasons for upholding the validity of a statutory formula the uncertainty as to the loss entailed by abrogation of leases, an uncertainty growing greater as the remainder of the term lengthens. 'Testimony as to present rental value,' it was said, 'partakes largely of the character of prophecy . . .' A remainder of fourteen years was there involved. Here there is a remainder of 969 years. That lease was for a store in the City of New York. Evidence of the value of unexpired terms of street railway leases would be even more difficult to produce, as possible lessees are limited in number. Since insolvencies are more frequent in economic depressions and since, as a consequence, estimates of the rental value of the remainder of the term are given under subnormal business conditions, the difficulties are multiplied.

"Judges in equitable proceedings will have the advantage of evidence in applying the usual rules as to the measure of damages. It is well understood that such evidence must show damages to reasonable certainty. Mere 'plausible anticipation' does not merit consideration nor are flights into the realm of pure speculation entitled to be treated as evidence. The determination of the amount to be allowed as the damage will be based on evidence which satisfies the mind."

MR. JUSTICE MCREYNOLDS was of the opinion that the judgment should be affirmed.

MR. JUSTICE BRANDEIS took no part in the case.

The case was argued by Messrs. Talcott M. Banks, Jr., and George W. Martin for the petitioner, and by Messrs. Herman J. Wells and James Garfield for the respondents.

Taxation—State Tax on Gross Receipts—Invalid as to Receipts from Interstate Business

The Washington tax on the privilege of doing business within the State is invalid as an undue burden on interstate commerce to the extent that it is measured by gross receipts from interstate sales.

Gwin, White & Prince, Inc., v. Henneford et al., 83 Adv. Op. 276; 58 Sup. Ct. Rep. 325.

This case involved a question whether a Washington tax measured by gross receipts from the appellant's business of marketing fruit shipped from Washington to places of sale outside the State burdens interstate and foreign commerce, in violation of the commerce clause of the Federal Constitution.

Washington statutes, enacted in 1935, lay 'a tax for the act or privilege of engaging in business activities upon every person (including corporations) engaging within this state in any business activity, "with certain exceptions, at the rate of one-half of 1% of the "gross income of the business."

The sole question was whether the taxation of the appellant's gross receipts derived from interstate business constituted such an interference with interstate commerce as to be a violation of the commerce clause.

In a suit to enjoin enforcement of the tax, the State Court sustained the levy. On appeal, the Supreme Court reversed the judgment, in an opinion by MR. JUSTICE STONE. In decision of the question, the effect of the tax is first described, as follows:

"While appellant is engaged in business within the state, and the state courts have sustained the tax as laid on its activities there, the interstate commerce service which it renders and for which the taxed compensation is paid is not wholly performed within the state. A substantial part of it is outside the state where sales are negotiated and written contracts of sale are executed, and where deliveries and collections are made. Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume."

While recognizing the principle that "even interstate commerce must pay its way" by sharing the local tax burdens, nevertheless, that principle was found insufficient to support the tax here. As to this MR. JUSTICE STONE says:

"It has often been recognized that 'even interstate

business must pay its 'way' by bearing its share of local tax burdens, . . . and that in consequence not every local tax laid upon gross receipts derived from participation in interstate commerce is forbidden. . . . But it is enough for present purposes that under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state . . . burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject.

"Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. . . Such a multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden."

Citing earlier decisions and remarking that for more than a century it has been recognized that the commerce clause gives some protection to interstate commerce against state taxation on the privilege of engaging in it, MR. JUSTICE STONE observes that both Congress and the States have accommodated their legislation to the rules judicially established. With respect to this the opinion states:

"For half a century, following the decision in *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326, it has not been doubted that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed. During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established. Instead, it has left them undisturbed, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. Meanwhile Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has been left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and other forms of taxation not destructive of it."

MR. JUSTICE BLACK delivered a dissenting opinion urging that since the power to regulate interstate commerce is vested in Congress under the Constitution, it should be left to Congress alone, and not to the courts to determine whether a state tax unduly burdens interstate commerce, and left to Congress to provide relief through legislation. The dissenting opinion concludes with the following comments:

"It is as essential today, as at the time of the adoption of the Constitution, that commerce among the States and with foreign nations be left free from discriminatory and retaliatory burdens imposed by the States. It is of equal importance, however, that the judicial department of our government scrupulously observe its constitutional limitations and that Congress alone should adopt a broad national policy of regulation—if otherwise valid State laws combine to hamper the free flow of commerce. Doubtless, much confusion would be avoided if the courts would refrain from restricting the enforcement of valid, nondiscriminatory State tax laws. Any belief that Congress has failed to take cognizance of the problems of conjectured 'multiple taxation' or 'apportionment' by exerting its exclusive power over interstate commerce, is an inadequate reason for the judicial branch of government—without constitutional power—to attempt to perform the duty constitutionally reposed in Congress. I would return to the rule that—except for State acts designed to impose discriminatory burdens on interstate commerce because it is interstate—Congress alone must 'determine how far [interstate commerce] . . . shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.'

"For these and other reasons set out elsewhere I believe the judgment of the Supreme Court of Washington should be affirmed."

MR. JUSTICE BUTLER and MR. JUSTICE MCREYNOLDS concurred in the result. MR. JUSTICE BUTLER says:

"Mr. Justice McReynolds and I concur in the result.

"Appellant is engaged exclusively in interstate commerce, a part of which is carried on in the State of Washington. For the privilege of doing that business the state statute purports to tax its gross earnings at the rate of one-half of one per cent. The exaction is plainly repugnant to the commerce clause. *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326. *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U. S. 298, 300. *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298, 300. *New Jersey Telephone Co. v. Tax Board*, 280 U. S. 338, 346. *Fisher's Blend Station v. Tax Comm'n.*, 297 U. S. 650, 655-656. *Puget Sound Co. v. Tax Comm'n.*, 302 U. S. 90, 94. See *Matson Nav. Co. v. State Board*, 297 U. S. 441, 444. Reversal appropriately may be based on citation of these decisions without more."

The case was argued by Mr. Frank S. Bayley for the appellant, and by Mr. R. G. Sharpe for the appellees.

Interstate Commerce Act—Power of Interstate Commerce Commission to Prohibit Storage-In-Transit Practices

The Interstate Commerce Commission has power to require carriers subject to the Interstate Commerce Act to cease and desist from furnishing to shippers, at less than cost, storage-in-transit and other services as prohibited discriminations, where they are not part of the transportation service and are not open to all shippers alike. A finding of the Commission, supported by evidence, that such non-transportation services are not compensatory is sufficient to sustain a cease and desist order without a finding that the reasonable value of the services rendered is greater than the charge to shippers.

The filing of tariffs by the carriers which specify charges for the non-transportation services does not legalize the discriminations effected through the furnishing of such non-transportation services at less than cost.

The Baltimore & Ohio R. R. Co. et al. vs. United States et al., 83 Adv. Op. 253, 59 Sup. Ct. Rep. 284.

This case involved a question as to the validity of an order of the Interstate Commerce Commission. It directed certain carriers serving the Port of New York to cease and desist from permitting shippers to occupy space by lease or otherwise in warehouses, buildings, or on piers owned or controlled by the carriers at non-compensatory rates and charges. The validity of the

order was sustained by the District Court and, on appeal, its ruling was affirmed by the Supreme Court, in an opinion by MR. JUSTICE REED.

The order was entered after an investigation by the Commission on its own motion. It was the practice of the carriers involved to furnish shippers in the Port of New York area certain storage, handling and insurance services. On account of the high price for storage space in wholesale and business districts of New York, dealers must store surplus stocks in low rent sections to serve merchants not having warehouses of their own. Various companies not affiliated with the carriers operate commercial warehouses for this purpose. The warehousing practices of the carriers, of which complaint was made, are those in connection with accessorial services described as commercial warehousing. Such accessorial services include storage and other warehousing services to enable shippers to hold and handle their commodities in ways not required by the rail movement itself. Some of the carriers lease space to shippers for warehousing and others have aided in financing structures on their property in which they lease space from their own subsidiaries, and still others own buildings and lease them to subsidiaries for warehousing operations. The carriers' entrance into warehousing was brought about by a desire to induce shippers to use their rail facilities. Competition between the carriers promoted the growth of the practice.

Another form of warehousing was the development of storage-in-transit privileges under tariff regulations filed with the Commission. These tariffs provide that westbound shipments "from points within the free lighterage limits of New York Harbor may be stored in designated warehouses . . . within the Port District, and, if reforwarded by rail within the period specified in the tariffs . . . the through rate . . . from point of origin in New York Harbor to final destination, will be applied." This operated to give shippers using carrier warehouses the advantage of port stoppage without extra transportation cost. These services, the cost of extra handlings and certain insurance furnished at a level premium rate were found by the Commission to be performed "at rates and charges which fail to compensate" the carriers for the cost, and the findings of fact by the District Court in this respect supported the order of the Commission.

The final order of the District Court dismissing the petition to set aside the order was attacked in the Supreme Court upon two grounds: (1) that the rendition of services at less than cost is not sufficient legally to establish that the carriers are thereby making concessions and through such concessions are guilty of violation of Sections 2, 3 and 6 of the Interstate Commerce Act; and (2) that the carriers have published and observed tariffs covering storage-in-transit and cannot be guilty as to such services of violating the same sections of the Act. The carriers contended that the questions as to violations of the Act by discrimination and rebate must be judged by the reasonable worth of the services rendered rather than by the cost to the carrier and that the charges for storage-in-transit are not warehousing costs but transportation costs and, consequently, that it is not violation of the law to furnish them at less than cost to the carriers.

Rejecting the carriers' contentions, MR. JUSTICE REED points out that the validity of the Commission's order depends upon whether a finding that the warehousing services were rendered at a charge below cost was sufficient to support the order without a further finding that the reasonable value of the service rendered was above the charge. In overruling the contentions of the carriers in this respect, the opinion cites the purpose of the provisions of the Act, the effect of the condemned practices and validity of the Commission's order and states:

"It was the view of the Commission and the lower court that the finding of the Commission showed a violation of Sections 2, 3(1) and 6(7) of the Interstate Commerce Act. These sections were enacted to assure the maintenance of rail transportation tariffs without rebate, discrimination or preference. No findings appear, nor has our attention been called to any evidence, which suggests the charges were made to meet the competition of the commercial warehousemen or were based upon the fair value of the services rendered, regardless of competition. On the contrary, it was the carriers' struggle to obtain line haul traffic which led them into the price cutting warfare. Charges for leases, storage, both in and out of the transit privilege, handling and insurance were alike slashed to meet the competition.

"Since the tariffs for rail haul are fixed for the various points and freight classifications, every shipper must pay that tariff for his transportation. As the shippers of the Port of New York district can utilize, in many instances, commercial storage and other warehousing services in addition to rail transportation, a saving on the non-transportation services obviously figures out the same as a rebate on the transportation service. It is immaterial that the shipper pays fair value or the market price for the extra privilege he enjoys. Section 6(7) of the Act forbids the carrier to receive less than the published rates for transportation or to remit 'by any device any portion of the rates.' When services, not necessary for transportation, are furnished below cost in an effort to acquire rail transportation, as was done here, this provision is violated. Since the carrier warehouse rates, as found by the Court and Commission, are not open to all shippers alike there is violation of sections 2 and 3(1) prohibiting discrimination and unreasonable prejudice. The rail transportation rates have charged against them the loss occasioned by warehousing practices designed to attract a volume of rail business.

"This is not to say that for every situation it is necessary that accessorial services should be rendered at not less than cost, rather than market or fair value. The Commission pointed out it was not condemning bona fide storage-in-transit for milling, manufacturing or processing, but oly the storage practices indulged in here to get rail transportation. In other circumstances fair value and market have been recognized as legitimate bases. Where competitive practices such as existed here are absent, reasonable or market value charges may well be the test. The power, however, is in the Commission, whenever it is of the opinion that any practice is unjust, unreasonable, preferential or otherwise violative of the Act, to prescribe what practice will be just, fair and reasonable. As in *Warehouse Co. v. United States* the Commission 'rightly secured the discontinuance of the discrimination by ordering the carriers to cease employing the means by which it had been accomplished.'"

The carriers urged in defense of the storage-in-transit practices the same contentions and, in addition, urged that the charges for that storage are and must be published in tariffs, and are part of the transportation costs and therefore may be rendered at less than cost. The Commission, however, thought the in-transit storage was not a part of transportation and that the filing of tariffs specifying the charges will not serve to avoid the violation. This conclusion the Court accepts, saying:

"If the service is non-transportation, the fact that it is in a tariff does not save it from the condemnation of Section 6(7). That section forbids receiving a less compensation for transportation than the tariff. The loss on

in-transit warehousing, entered into to secure the rail-haul, results in lowered receipts for the transportation and in violation of the section. Some shippers are not in a position to avail themselves of the below-cost in-transit service. They must pay the full transportation rate, without any offset from the warehousing. This discrimination between shippers is unlawful and the remedy applied by the order valid in these circumstances."

The case was argued by Mr. Edwin H. Burgess for the Appellants; Mr. J. Stanley Payne for Appellees, the United States and Interstate Commerce Commission; Mr. John J. Hickey for Appellee, Warehousemen's Protective Committee; Mr. A. Lane Cricker for Appellee, Am. Warehousemen's Association, Merchandise Division; and Mr. Henry E. Faley for Appellee, Boston Port Authority.

Summaries of Other Cases

Courts—Jurisdiction in Administration of Trusts—Conflict Between State and Federal Courts

Princess Lida et al. v. Thompson et al., 83 Adv. Op. 292; 59 Sup. Ct. Rep. 275. (No. 118, decided January 3, 1939.)

Certiorari to review a judgment of the Supreme Court of Pennsylvania, and to settle a conflict of decision by that Court with a decision of a federal district court in Pennsylvania. The question arose in a controversy as to the propriety of acts of trustees under a trust agreement made in Pennsylvania in 1906 and amended in 1915. In the Common Pleas Court of Fayette County, Pennsylvania, the trustees filed a second and partial account on July 7, 1930. Next day two of the cestuis sued in equity in a federal court praying for removal of the trustees for mismanagement. Later the Court of Common Pleas extended the time for filing exceptions to the second account, and on February 16, 1931, exceptions were filed in that court by one of the cestuis. The proceedings were carried forward to a point where both the Court of Common Pleas and the federal district court issued injunctions enjoining further proceedings in the other court. The Supreme Court of Pennsylvania affirmed the injunction of the Court of Common Pleas.

On certiorari, the Federal Supreme Court ruled, in an opinion by MR. JUSTICE ROBERTS, that since the relief sought in both courts would require them to cover the same ground, and since effective exercise of jurisdiction by the court required a substantial measure of control over the trust res, the court which first acquired jurisdiction had exclusive jurisdiction. Since the Court of Common Pleas first acquired jurisdiction on the filing of the trustees' account, its jurisdiction was exclusive, and its injunction against further proceedings in the federal court was proper.

The case was argued by Mr. Charles H. Tuttle for the petitioners, and by Messrs Dean D. Sturgis and W. Brown Higbee for the respondents.

Practice—Federal Courts—Conformity Act—Direction of Verdict for Plaintiff Where Defendant Moves for Directed Verdict

Lyon v. Mutual Benefit Health and Accident Assn., 83 Adv. Op. 301; 59 Cup. Ct. Rep. 297. (No. 189, decided January 3, 1939.)

Certiorari to review a judgment of the Circuit Court of Appeals (8th Circuit) reversing a judgment of the District Court for Western Arkansas entered on a directed verdict for plaintiff. The action was brought by petitioner to recover on a policy of health and accident insurance issued to her husband, who was killed accidentally on July 26, 1934. At the close of the plaintiff's case the defendant offered no evidence but moved for a directed verdict, contending (1) that the policy was not in effect when the insured was killed, because the insurance company has exercised an option under the policy to reject the quarterly premium due July 1, 1934, and (2) that the premium receipts showed that the policy terminated prior to the time the loss occurred.

The Circuit Court of Appeals reversed, holding that the insurer had the right to reject any quarterly premium on the due date, and that it had duly exercised its option prior to the date of the insured's death. It held also that there was no competent evidence to prove that the required premiums had been made.

The Supreme Court, in an opinion by MR. JUSTICE BLACK, reversed the ruling of the Circuit Court of Appeals and held that there was competent and substantial evidence to support the allegation that sufficient premiums had been paid to keep the policy in force to and including the date of the insured's death and that it was unnecessary to consider whether the insurance company had an option to cancel the policy on any quarterly premium date. It held further that under the Conformity Act the trial court properly followed the procedural rule prevailing in Arkansas, since that rule does not deprive any party of fundamental rights guaranteed by the Constitution or federal law. The opinion points out that the procedural rule in Arkansas closely approximates the rule approved by the Supreme Court, and that since there was substantial evidence to support the trial court's verdict and judgment, it should be affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER dissented on the grounds stated in the dissent of Circuit Judge Stone, in the Circuit Court of Appeals, 95 F. (2d) 528,534, who was of the opinion that the case should have been submitted to the jury on the plaintiff's testimony.

MR. JUSTICE ROBERTS did not participate.

The case was argued by Mr. John W. Nance for the petitioner, and by Messrs. Thomas B. Pryor and Thomas B. Pryor, Jr. for the respondent.

Court of Claims—Jurisdiction—Claims on Contracts with Indian Tribe

United States v. Algoma Lumber Co., 83 Adv. Op. 288; 59 Sup. Ct. Rep. 267 (Nos. 245, 246, 247, decided January 3, 1939).

Certiorari to review judgments of the Court of Claims in favor of respondents and against the Government for overpayments made under contracts for the sale of timber on lands of the Klamath Indian Reservation in Oregon, and to determine whether the Court of Claims has jurisdiction. The contracts were executed by the Superintendent of the Klamath Indian School, under authority of Congress. Since the Indians are the beneficial owners of the lands and timber thereon, and payments made upon sales of timber are held and used for the benefit of the Indians, the fact that the Government makes regulations respecting contracts for the sale of such timber does not make the Government a party to the contract. Such a contract is not the obligation of the Government and overpayments thereunder give rise to no contract for repayment implied in fact on the part of the United States. The Court of Claims

has no jurisdiction over any cause of action arising by virtue of such overpayments.

MR. JUSTICE STONE delivered the opinion.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE ROBERTS did not participate in the case.

The case was argued by Mr. Paul A. Sweeney for the petitioner, and by Messrs. Carl D. Matz and William S. Bennet for respondents in Nos. 245 and 246, and Mr. Ralph H. Chase for respondent in No. 247.

Federal Income Tax—Limitations—Assessments

United States v. *Continental National Bank and Trust Company.* 82 Adv. Op. 240; 59 Sup. Ct. Rep. 308. [No. 22, decided January 3, 1939.]

Certiorari to determine whether an action brought in 1932 to collect 1920 income and profits taxes assessed in 1925 against a dissolved corporation, from trustees and beneficiaries of the estate of a deceased principal shareholder of the corporation who had received proceeds of the corporate assets upon dissolution, is barred by lapse of time under §§ 277, 278, and 280 of the Revenue Act of 1926. The only assessment made against deceased was a jeopardy assessment made in 1931 after his death and the suit was based upon that assessment. No assessment was ever made against the trustees and beneficiaries of his estate.

The Court's opinion by MR. JUSTICE BUTLER holds that the Revenue act imposes no liability upon the beneficiaries and trustee on account of the jeopardy assessment against the deceased stockholder since they are not transferees of the taxpayer's property within the meaning of § 280. The opinion further holds that the jeopardy assessment of 1931 was out of time under the time limitations of § 277 of the Act.

The opinions of the lower courts holding that the action was barred by lapse of time were therefore affirmed.

MR. JUSTICE STONE delivered an opinion in which MR. JUSTICE BLACK concurred which stated that the judgment should be reversed because under his view of the act the beneficiaries and trustees of the stockholders estate were transferees of "a taxpayer" within the meaning of § 280, and therefore subject to an enforceable liability.

The case was argued on December 5, 1938, by Mr. J. Louis Monarch for petitioner and by Mr. Herbert Pope for respondents.

Federal Income Tax—Deductions for Charitable Contributions—Capital Losses

United States v. Pleasants. 83 Adv. Op. 309; 59 Sup. Ct. Rep. 281. [No. 169, decided January 3, 1939.]

Certiorari to determine whether the 15% allowed as a deduction for charitable contributions under section 23(n) of the Revenue Act of 1932 is to be calculated on the taxpayer's net income computed without regard to his capital net loss.

The Court's opinion by MR. CHIEF JUSTICE HUGHES concludes that Congress intended the special provisions in § 181(b) of the Act which require deduction of a percent of the capital loss from the tax as computed without regard to such losses to be so applied that the net income without this deduction should be the subject of the tax, and that therefore the charitable deduction allowed by § 21(n) is applicable to that net income, irrespective of capital losses.

The cases were argued December 5, 1938, by Mr. Frederick Schwertner for respondent and by Mr. Paul A. Freund for petitioner.

Federal Income Tax—Computation of Deductible Loss

Helvering v. Owens, et al. 83 Adv. Op. 266; 59 Sup. Ct. Rep. 260. [Nos. 180, 318, decided January 3, 1939.]

Certiorari involving the basis to be used in determining for Federal Income tax the amount of loss sustained during a single taxable year from injury to property not used in a trade or business and therefore not the subject of any annual depreciation allowance. Certiorari had been granted because of conflicting circuit court holdings as to whether the original cost or the value immediately prior to the accident should be the base.

The Court's opinion by MR. JUSTICE ROBERTS holds that §§ 23(e)(3) and (h) and 113 of the Revenue Act of 1934 and similar provisions of the 1932 act impose limitation upon the deductible amount so that it may not exceed cost and for depreciable non-business property, that it may not exceed the loss actually sustained in the taxable year, measured by the then depreciated value of the property.

The case was argued on December 9, 1938, by Mr. Norman D. Keller for the Commissioner of Internal Revenue, and by Mr. Ewing Everett for the taxpayers.

Indian Lands—Condemnation—Suits Against United States—Jurisdiction of District Courts—Removal of Actions

Minnesota v. United States. 83 Adv. Op. 248; 59 Sup. Ct. Rep. 292. [No. 73, decided January 3, 1939.]

Certiorari to determine whether the United States district court was authorized to order condemnation of Indian lands on petition of the state in which the land was located, when the original proceeding was begun in a state court and later removed to the Federal court by consent of the United States Attorney, but where the United States maintains that it has not consented to be sued, and that, since it is an indispensable party, both State and Federal courts are without jurisdiction.

The Court's opinion by MR. JUSTICE BRANDEIS holds that the United States is an indispensable party defendant, since it owns the fee to the Indian allotted lands and has an interest in them as trustee; that therefore the condemnation proceedings cannot be maintained unless the United States has authorized it by some act of Congress. The opinion further finds that no act of Congress authorizes suits to condemn in the state courts and that the Federal court's jurisdiction after removal is no broader than that of the state court, even in a proceeding which might have been maintained if it had been brought originally in the Federal court. The opinion further finds that neither U. S. C., Title 25, § 357 nor the administrative practice under it can be construed as granting permission to sue the United States in State courts for condemnation of Indian lands.

The case was argued on November 10, 1938, by Mr. Ordner T. Bundlie for petitioner and by Mr. MacAshill for respondent.

Indian Lands—National Parks—Appropriation by United States

Chippewa Indians of Minnesota v. United States. 83 Adv. Op. 299; 59 Sup. Ct. Rep. 313. [No. 244, decided January 3, 1939.]

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1908, which created a national forest upon lands then in the possession of the United States as trustee for the Chippewa Indians, by the terms of which the Secretary of the Interior was to appraise the timber on the land "forthwith" and pay the appraised value to the Indians, the appropriation by the United States of the property for the park took place upon the passage of the Act. The Indians maintained that the appropriation was not complete until the appraisal of the timber was actually completed in 1923 and therefore sought compensation for the taking of lands and timber at their value on that date.

The Court's opinion by MR. JUSTICE BLACK examines the language of the Act and concludes that under it the court of claims was correct in finding that the date of the enactment in 1908 rather than that of the appraisal in 1923, was the time when the appropriation of land and timber actually occurred.

The case was argued on December 9th and 12th, 1938, by Mr. Webster Ballinger for appellant and by Mr. Raymond T. Nagle for appellee.

Indian Lands—Water Rights

United States v. Powers. 83 Adv. Op. 321; 59 Sup. Ct. Rep. —. [No. 102, decided January 9, 1939.]

Certiorari to review dismissal of bill for injunction brought by the United States to prevent the owners of certain lands allotted from the Crow Indian Reservation for exclusive use, and later conveyed in fee, from diverting water from certain adjacent non-navigable streams which the owners had for many years used for irrigation and without which cultivation would be difficult.

The Court's opinion by MR. JUSTICE MCREYNOLDS reviews the history of the treaties, legislation, official acts and allotments involved and concludes that such an allotment and ownership as that here in dispute carries with it the right to use some portion of tribal waters essential for cultivation and that the bill was, therefore, properly dismissed.

MR. JUSTICE REED took no part in the case.

The case was argued on November 18, 1938, by Mr. Charles W. Leaphart for petitioner and by Mr. T. H. Burke for respondents.

State Taxation—Gross Receipts Taxes—Interstate Commerce

James v. United Artists Corporation. 83 Adv. Op. 246; 59 Sup. Ct. Rep. 272. [No. 161, decided January 3, 1939.]

Appeal from a decree of a three judge district court enjoining as an unconstitutional burden on interstate commerce the collection from the United Artists Corporation of Delaware, of a Virginia state tax upon the gross receipt of individuals and corporations engaged in the busines of collecting incomes from the use of real or personal property. The corporation carried on no business within the state except such as was involved in soliciting contracts for the exhibition of its motion picture film in local theatres, and had no collection agent there. All sums due under the exhibition contracts were paid to the company branch office located outside the state.

The Court's opinion by MR. JUSTICE STONE finds that the provisions of the statute imposing the tax show a legislative intent to restrict it to activities within the state, and that it is therefore inapplicable to this corporation. It finds that the exhibition contract provision by which the company's share of the gross receipts of the theatres is set apart "in trust" for it, does not make the exhibitor an agent of the company, nor dispense with the exhibitors legal obligation to make all payments to the company without the state.

The opinion expressly leaves open the question whether by a properly framed statute the state may lay a tax upon income derived from sources within it, or upon the solicitation of contracts.

The case was argued on December 8th and 9th, 1938, by Mr. Clarence W. Meadows for appellant and by Mr. Robert G. Kelley for appellee.

State Taxation—Tax on Receipts—Interstate Commerce

Bacon & Sons v. Martin. 83 Adv. Op. 313; 59 Sup. Ct. Rep. 257. [No. 203, decided January 3, 1939.]

Appeal from the Court of Appeals of Kentucky involving the constitutionality of a statute of Kentucky which imposed a tax on "the receipt of cosmetics" by retailers within that state.

The Court's *per curiam* opinion finds that the statute does not directly burden Interstate Commerce because the state court has construed it as an excise upon the sale and use of the cosmetics rather than upon their "receipt" and that construction is binding. The appeal was therefore dismissed for the want of a substantial Federal question.

The case was argued on December 15, 1938, by Mr. Charles I. Dawson.

State Statutes—Liquor Regulation—Equal Protection—Due Process

Indianapolis Brewing Co. v. Liquor Control Commission of State of Michigan. 83 Adv. Op. 236; 59 Sup. Ct. Rep. 254. [No. 130, decided January 3, 1939.] and

Finch and Co., et al v. McKittrick, et al. 83 Adv. Op.; 59 Sup. Ct. Rep. [Nos. 252-256, decided January 3, 1939.]

Appeals from three judge district court decisions sustaining the Constitutionality of Statutes of Missouri and Michigan both of which prohibited the sale within those states of alcoholic beverages manufactured in other states which by their laws or regulations discriminate against alcoholic beverages manufactured within those two states.

The Court's two opinions, both by MR. JUSTICE BRANDEIS, uphold the validity of both laws. The Michigan law was held not to violate the commerce clause because the Twenty-first Amendment has removed state regulation of intoxicating liquor from the limitations of that provision, nor the equal protection clause, nor the due process clause. The Missouri law, which was challenged in the Supreme Court solely as an interference with interstate commerce was upheld by reasoning similar to that in the Michigan case.

The Michigan case was argued on December 7, 1938, by Mr. Thomas F. O'Mara and Mr. Herbert J. Patrick for appellant and by Mr. Raymond W. Starr for appellees; and the Missouri cases on December 7, 1938, by Mr. Thomas Kiernan for appellants and by Mr. Edward H. Miller for appellees.

Oil and Mineral Rights—Equal Protection—Due Process—State Statutes

Patterson v. Stanolind Oil and Gas Co. et al. 83 Adv. Op. 314; 59 Sup. Ct. Rep. 259. [No 113, decided January 3, 1939.]

Appeal from the Supreme Court of Oklahoma in an action which challenged the validity under the due process and equal protection clauses of the fourteenth amendment, of the Oklahoma Oil Well Spacing Act and an order of the state corporation commission which required the owner of the tract upon which the well was situated to share with owners of other tracts in the same 10 acre well spacing unit the oil and gas produced from that well.

The Court's *per curiam* opinion assumes, since the evidence is not in the record, that the commission's finding that the source of supply of the well is common to the land in question adjoining it and that the pool underlies the land of the owners of other tracts in the unit as well as that of the tract upon which it is located, is correct. The statute and order were therefore held not to violate the Fourteenth Amendment, and the contention that the statutory provisions authorizing the commission's order was void for indefiniteness was held to be without merit. The appeal was dismissed for want of a substantial Federal question.

The case was argued on December 7, 1938, by Mr. R. J. Roberts for appellant.

Veterans—War Risk Insurance—Revival of Lapsed Policies

United States v. McClure. 83 Adv. Op. 306; 59 Sup. Ct. Rep. 335. [No. 154, decided January 3, 1939.]

Certiorari to determine whether a yearly renewable term war risk insurance policy which lapsed in 1919 is revived by § 305 of the war risk insurance act, which provides that insurance of a person who became permanently or totally disabled, which has lapsed while the insured was suffering from a compensable disability for which compensation was not collected, shall not be considered as lapsed but entitles the insured to as much of his insurance as the uncollected compensation would purchase if applied as premiums when due.

The Court's opinion by MR. JUSTICE BLACK finds that the history of the legislation shows that it was not the intent of Congress to limit the revival of policies under § 305, by the provision of § 301 that all yearly renewable term insurance shall cease on July 2, 1927, and concludes, therefore, that the lapsed policy was revived under § 305 of the act.

The case was argued on December 8, 1938, by Mr. Julius C. Martin for petitioner and by Mr. Graham K. Betts for respondent.

Carriers—Due Process

Alton Railroad Co. v. Illinois Commerce Commission. 83 Adv. Op. 332; 59 Sup. Ct. Rep. —. [No. 231, decided January 16, 1939.]

Appeal from Supreme Court of Illinois which upheld the constitutionality under the due process clause of the Fourteenth Amendment of an order of the Illinois Commerce Commission which denied to the railroad authority to discontinue, and required it to continue, maintenance and operation of a switch track built on land owned not by the railroad but by the industries which it served, and constructed by them. The railroad sought to require the industries served to pay costs of maintenance.

The Court's opinion by MR. JUSTICE BUTLER denies a motion to dismiss or affirm on the ground that the question is not so lacking in merit as to be decided merely by citation of authorities. It then examines the facts in detail and finds that in law and fact the switch line is open to use to serve the public and is a part of the carrier's system. Thus viewed, the opinion concludes that the state has authority to require the carrier to continue its maintenance and operation if that is in the public interest. It is pointed out that there is no contention that continued operation of the line by the carrier even if costs of maintenance must continue to be paid by it will not be profitable to it, and that even though expenditures for improvements are chargeable to operating expenses, they are returnable out of revenue as part of cost of maintenance and under the due process clause will be safe from confiscation if the title to the land and track is acquired by the carrier.

MR. JUSTICE BLACK was of opinion that the motion to dismiss should have been granted.

MR. JUSTICE ROBERTS took no part in the case.

The case was argued on December 15th and 16th, 1938, by Mr. Frank H. Towner for appellant and by Mr. Harry R. Booth for appellees.

United States District Court—Removal of Actions—Separable Controversy—Diversity of Citizenship

The Pullman Company et al. v. Jenkins et al. 83 Adv. Op. 324; 59 Sup. Ct. Rep. —. [No. 210, decided January 16, 1939.]

Certiorari involving the removal jurisdiction of the district court for California in an action commenced in the California state courts on behalf of a conductor of the Southern Pacific R. R. Company against the railroad, the Pullman company, employees of both companies, and a passenger, for injuries resulting from a blow struck by the passenger while he was being ejected from a train by police officers and the injured conductor for drunken and disorderly conduct. The state court complaint alleged two causes of action, one against the passenger for injuries and the other against the railroad and its gate tender and the Pullman Company and its porter and conductor for negligence in permitting the passenger to pass the gates and to board the Pullman car. Plaintiff and the passenger and all of the employees of both companies were residents of California. The Pullman Company, an Illinois corporation, petitioned for removal of the cause of action against it under U. S. C., Title 28, § 71, on grounds of diversity of citizenship. The petition was granted. Amended complaints were filed in both courts basing the cause of action against the Southern Pacific on the Federal Employers' Liability Act and stating that the Pullman porter, described by John Doe designation in the original complaint, had been served with process and was a citizen of California. The claim against the Railroad and its employee was settled and dismissed as to them, and a motion to remand was made in the Federal court. This was denied and on appeal to the circuit court of appeals, the ruling was reversed on the ground that the amended complaint showed a non-separable controversy.

The Supreme Court's opinion by MR. CHIEF JUSTICE HUGHES holds that the circuit court erred in reversing the district court because of the showing of amended complaint since the right to removal must be determined according to the plaintiff's pleadings at the time the petition is filed. However, the opinion sustains the conclusion of the circuit court because although the original pleading did show a separable controversy, as between the allegations for relief against the Southern Pacific and its employee and those against

the Pullman company and its employees; and although the original complaint did not show the citizenship of the Pullman porter and he had not been served with process, yet the burden is upon the party seeking removal to show a separable controversy wholly between citizens of different states even as to parties joined in good faith but not yet served with process. Since the Pullman company did not do this, the action was not removable.

MR. JUSTICE BLACK filed a separate concurring opinion in which he agreed that removal was improper because the party seeking removal must show diversity and that use of a John Doe designation did not relieve it of that burden but in which he points out that the amended complaint clearly sought relief under the Federal Employers' Liability Act thus merely clarifying the original complaint which indicated that this was the basis of the action, and that this affords an additional reason for denying removal jurisdiction since such actions cannot be removed to the Federal courts. JUSTICE BLACK's opinion also disagrees with the statement in the majority opinion that if the controversy is severable, the fact that under state practice it may be joined with another controversy against other defendants does not preclude removal—a point which he believed did not require discussion in the decision of this case.

MR. JUSTICE ROBERTS took no part in the case.

The case was argued on December 13th and 14th, 1938, by Mr. Robert Brennan and Mr. M. W. Reed for petitioners and by Mr. L. H. Phillips for respondents.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

INVISIBLE STRIPES, by Warden Lewis E. Lawes. 1938. New York: Farrar & Rinehart, Inc. Pp, 315. Although convicts no longer wear zebra suits, Warden Lawes finds them marked with invisible stripes, both before and after imprisonment. His fifth book, like its predecessors, is written for the general public rather than the professional worker. Of greatest interest the reader will find the prison diary in which a former member of the Stock Exchange gives his slant on what inmates do and think and also the anecdotes which Mr. Lawes gathers from his rich experience to illustrate his points.

He goes beyond the prison walls to challenge the home, the school, the church and the law as responsible for delinquency. Although admitting that comparatively few lawyers take up residence in Sing Sing, he indicts them as protagonists of a system which shackles justice with cumbersome traditions. In his opinion, lawyers serving as legislators have resisted legal simplifications which would destroy intricacies helpful to criminals. He accuses lawyers of invoking hair-splitting interpretations of the statutes in defense of gangster clients and accepting plunder as fees.

He declares that our criminal code and procedure is based on vengeance rather than rehabilitation and is in urgent need of restatement in terms of modern thought and necessity. In addition to uniform state codes he recommends that the criminal processes of any court should be honored throughout the country. Extraditions and subpoenas of witnesses should be taken as a matter of course. He also advocates, with Professor Glueck of Harvard Law School, that trial courts should merely determine the guilt or innocence of the accused. Sentence, by a board of experts, should come only after a period of experimental institutionalization. This would obviate the bickering now caused in Sing Sing by twenty-four judges, "soft" and "sour," who allot strikingly unequal sentences for similar crimes.

Causes of Crime: Biological Theories in the United States, 1800-1915. Arthur E. Fink. 1938. Philadelphia: University of Pennsylvania Press. Pp. 309.—In this study we are given a longitudinal view of medical jurisprudence in America, the first systematic presentation in the field. Curiously enough the first chapter deals with phrenology which gave impetus to the scientific study of the criminal. With copious footnotes and an excellent bibliography the author sketches the advancing thought of the nineteenth century in regard to the anatomy and physiology of the criminal, heredity, feeblemindedness, and insanity. He finds that we are no further ahead in determining the legal culpability of the insane than we were in 1855 when Francis Wharton aroused the admiration of the bar with his treatise on the subject. With the publication in 1915 of Healy's *The Individual Delinquent* he states that a new era begins in criminology in which, with appropriate techniques, emphasis is placed upon psychological and social rather than anthropological factors.

Brothers in Crime. Clifford R. Shaw, Henry D. McKay, and James F. McDonald. 1938. Chicago: University of Chicago Press. Pp. 364.—Typical patterns of delinquency are traced in this Behavior Research Fund Monograph. Official records dealing with five brothers over a period of fifteen years are granted insight by reports of clinical workers; color and added significance are lent by autobiographies in which the lawbreakers offer personal interpretations of their life experiences. One of the men is still incarcerated; four have been engaged for years in legitimate activities. Rather than of psychogenetic origin, their criminal careers are found to be the result of the situation in which they have been

reared. The effects are shown of family disorganization, culture conflict, and neighborhood modes of life in shaping attitudes and behavior. Because of the failure of traditional methods which deal only with the individual offender, the necessity is indicated for developing environmental procedures for the prevention and treatment of crime. Institutionalization is viewed as provocative of further offenses. As yet, effective methods for community programs are not known, but the authors outline a societal approach to the problem. This monograph is an interesting example of interprofessional collaboration that deserves wide reading.

JAMES HARGAN.

New York City.

The Valuation of Property: A Treatise on the Appraisal of Property for Different Legal Purposes, by James C. Bonbright. 1937. New York: McGraw-Hill Book Company, Inc. Vol. I and II, Pp. 1271.—This is a comprehensive compilation based upon articles prepared under the auspices of the Committee for Research in Social Science of Columbia University. As stated in his conclusions the author writes as an economist in derogation of the decisions of the courts in what he calls "judge-made law", and as such, does not find a more logical method of determining value or values for different purposes.

No one who goes through the labor incident to examining the two volumes can doubt the earnestness of the examination of such a mass of decisions and publications on the subject. His views should be considered in connection with his background. A believer in government ownership, with little respect for the laws as framed or interpreted, and a lack of confidence in expert appraisers, he attempts to find a solution of the problems in valuation through the reasoning of an economist.

The books well illustrate the complications of the many basic contentions considered in a valuation procedure, well stated by the United States Supreme Court, that all facts are to be given such weight as is just and right in each case. That is what an economist must do, or resort to a formula, which anyone of experience knows can not be of general application to produce an equitable result.

There is but little practical help to be obtained from the volumes as a whole, but anyone may obtain valuable information and benefit by a study of the separate chapters.

THOMAS W. HULME.

Haverford, Pennsylvania.

American Family Laws, by Chester G. Vernier. 1938 Supplement. Stanford University: Stanford University Press. Pp. XV, 178.—This supplementary volume completes Professor Vernier's exhaustive study and brings the preceding five volumes up to date as of January 1, 1938. Perhaps it should not be a matter of surprise to find how rapidly the legislative mill continues to grind out statutes in the field of domestic relations. Nevertheless one cannot forbear a statement of surprise. It is highly significant that the largest volume of change within recent years has occurred within the field of adoption. It is interesting, whether or not a trend is indicated, that three jurisdictions, namely, Arkansas, District of Columbia, and Maryland, have included amendments which provide that adults as well as minors may be adopted.

Perhaps next in significance are the statutes providing for advance notice of intent to marry, which nine states have added, making the total now twenty-six jurisdictions. In the field of marriage licenses Delaware has added a significant amendment to the effect that the marriage license must now have endorsed upon it information concerning previous marriages or divorces of the parties. West Virginia has amended the marriage law by making it unlawful for a minister to solicit the celebration of a marriage ceremony. This should have a wholesome effect in reducing somewhat the Gretna Green evil of "marrying parsons" and "marrying justices of the peace." North Dakota has repealed an early statute which recognized the solemnization of marriage between Indians according to tribal customs. Two jurisdictions, namely, Nebraska and New Mexico, have held common law marriage invalid by judicial decision. Six jurisdictions which accepted the common law ages of consent heretofore have now enacted legislation requiring the attainment of a higher age before an absolutely binding marriage may be contracted. "Amendments in several other jurisdictions have the effect of increasing the age requirements for those jurisdictions."

Not so commendatory are statutes recently enacted in Nebraska and South Dakota permitting the marriage of a feeble-minded person where either person has been rendered sterile by operation or is otherwise incapable of procreation. On the other hand progress may be noted by the fact that California, Illinois, Michigan, and New Hampshire have passed statutes prohibiting the marriage of persons with venereal disease.

Twelve jurisdictions have "liberalized" divorce statutes by adding miscellaneous "causes" for divorce and by reducing residence requirements.

A New York statute permits the court on motion of the defendant in bastardy proceedings to order the making of blood-grouping tests which may be received in evidence. Somewhat along the same line is a new Wisconsin statute in 1935. Although only a year has elapsed since the fifth volume of Professor Vernier's study appeared, numerous significant changes have been made in the law relating to infants, aliens and insane persons. Three tendencies may be observed in this legislation:

a. Additional power is given the minor to protect himself by insurance.

b. Increased protection to the minor is given by new juvenile court laws.

c. Child labor laws have been strengthened.

By the production and publication of this supplementary volume Professor Vernier has shown that even without the device of a loose-leaf technique it is possible for such an encyclopedic work to be kept reasonably up to date. It is to be hoped that similar supplementary reports may be issued from time to time as need requires.

ARTHUR J. TODD.

Northwestern University.

Labor Problems and Labor Law, by Albion Guilford Taylor. 1938. New York: Prentice-Hall Inc. Pp. 663.—This book is broad. Part I is entitled The Nature and Origin of Labor Problems; Part II, The Labor Movement; Part III, The Legal Background of the Labor Movement; Part IV, Social and Legal Phases of the Problems; Part V, The Government in

Labor Disputes; and Part VI, The Approach of the Employer.

Besides being broad, it is shallow and muddy. If it were neater, high school students could enjoy wading in it. If the author's effort had been channeled, it might have become living water to nourish some part of labor relations. If the water had been filtered, it would have served as a reservoir for the thirsty. Actually the book disgusts the reader because of its disorder and distortion, and discredits the author, the persons thanked in the preface for collaboration, and the publisher.

Sometimes self-contradictory, it constantly shows lack of proportion and sequence:

"While medical care must be had immediately after injury, in all but *two* states money benefit payments [under accident compensation laws] start later. (p. 269) . . . The state of Oregon *alone* has no waiting period and compensation begins on the day of accident. (p. 270) . . . Compensation for total disability ranges [in the several states] from 50 per cent to *66⅔* per cent of weekly wages. (p. 270) . . . Compensation Per Cent of Wages. Total Disability. Wisconsin. *70.*" (Table, p. 275) (italicization added).

"The legality of picketing, then, depends upon the court's interpretation of Chief Justic Taft's phraseology in the Tri-City case and Justice Brandeis's opinion in the Senn versus Tile Layers case, upon the varying circumstances surrounding the case in question, the presence or absence of intimidation, the character and degree of intimidation, the number of pickets involved, or the practice of violence." (p. 501).

"This provision of the Social Security Act, creating old-age benefits, does not require any state legislation. (p. 289) . . . It is recognized in the Act that to states were reserved all functions not specifically assigned to the Federal Government. The Act, *therefore,* is constructed upon the understanding that the responsibility to provide aid for the *aged,* the indigent, and the unemployed rests with the individual states." (p. 300) (italicization added).

Lack of sequence is glaringly illustrated by the insertion of a description of federal housing activities in the middle of a chapter on Personnel Management. Likewise the International Labor Organization does not belong in the middle of a chapter on How American Labor is Organized. Instead of (or besides, at an appropriate place and with greater accuracy) describing the I.L.O. (an agency of which international *states* are the only members), and making vague reference to the First, Second, and Third Internationals (agencies of *political parties*), the author could well have said something of the world *labor* federations—the Red International of Trade Unions (Moscow), the International Federation of Christian Trade Unions (Utrecht), and the International Federation of Trade Unions (Amsterdam and Paris), of which last the American Federation of Labor is a member.

The author's muddled thought and careless language, resulting sometimes in false statement, is shown by his accepting iteration (p. 11 and p. 209) of Richard T. Ely's amazingly bad definition of the police power as "that power of the courts granted to them by the American constitutions, whereby they must shape property and contract to existing conditions by settling the question of how far social regulations may without compensation impose burdens on property";
by his mention (p. 428) of railroads as operating before 1820 in the United States; by his calling (p. 513) Sidney Howard's *The Labor Spy* a "British Report;" by his statement (p. 567) that the Amalgamated Clothing Workers' long-standing agreement with Hart, Schaffner, and Marx "passed out of the picture when Hart, Schaffner, and Marx became insolvent"; and by strange generalizations, such as:

"Workmen's compensation acts illustrate attempts to equalize the status of workers and of employers in the bargaining process." (p. 204).

"Public employees are generally prohibited, or at least discouraged, from joining unions, though federal employees are permitted to organize but are under contract not to strike during their term of employment." (p. 488).

"American state compensation laws today *commonly* excluded *as beneficiaries* any workers who are in non-hazardous occupations; those engaged in interstate *commerce;* domestic servants and agricultural workers; casual laborers; . . . Casual labor has never been clearly defined, though some *legislatures* have *interpreted* casual employment to mean all lasting less than a certain number of days fixed by law." (p. 266) (italicization added).

It may amuse the present National Labor Relations Board to be told that it has set up "regional boards . . . to serve as bodies of original jurisdiction" (p. 588); the scientific managers to see the Rowan, Halsey and Gantt plans compared by means of figures that won't fit together (p. 619-621); the Supreme Court to learn various things that ain't so about its decisions in the Mackay (p. 593), Jones and Laughlin (p. 589) and Schechter (p. 517) cases and that it has not yet decided *Herkert v. United Leather Workers* (p. 552). But such errors darken counsel for readers who may be less well informed.

And what is the American employer to make of the statement that

"if violence accompanies labor's activities, he may choose the aid of the militia through criminal prosecutions rather than the aid of the courts through the use of an injunction." (p. 547)?

Labor Problems and Labor Law, though dated September, 1938, reads for the most part as if written before the enactment of Sec. 7(a) of the NIRA. The effect of that section and of the NLRA is only half perceived:

"If the employer can accomplish the same end [that he might obtain by a lockout] by discharging leaders in the union group, that is a more economical procedure and often quite as effective. Such a procedure, however, became difficult after the United States Supreme Court in 1937 upheld the National Labor Relations Act. The right of the employers to lock out their employees has been sustained without any qualification." (p. 506).

Whereupon, without further mention of the NLRA, the author proceeds, after some explanation of the externals of the lockout, to give quaint background for the practice of strike-breaking by quoting from an unspecified "amusing old chronicle dating from Cromwell's time which informs us that one day in the year 1535" etc.

Not being an economist, the reviewer will say nothing about the more technically economic chapters, except that these, like the rest, seem to have no originality or other positive merit to mitigate the foggy thinking and sloppy writing that characterize the whole book. Each chapter is followed by a good bibliography—useful, above all, as a means of rescue from this broad slough of despond.

WILLIAM GORHAM RICE, JR.
University of Wisconsin Law School.

The Administration of Justice from Homer to Aristotle. Vol. II, by Robert J. Bonner and Gertrude Smith. 1938. Chicago; University of Chicago Press, Pp. vi, 320.—This technical work on legal history, a

collaboration by two outstanding authorities in the domain of classical Greek literature, is intended as the second unit in a three-volume set. The first volume, entitled *The Administration of Justice from Homer to Aristotle*, dealt with the evolution of the judiciary. The present contribution amplifies the subject by considering practice and procedure. The proposed third volume will develop various aspects of Greek legal systems, other than that under investigation in the first two books.

The authors have assembled in one volume the conclusions of various publications. They have endeavored to criticize or enlarge the findings of Lipsius and other experts in the ancient Greek legal field. But they have "not attempted to describe all the suits civil and criminal and their distribution among the various magistrates, judicial officers, and boards and the process of litigation from the initiation of a suit to the verdict." These matters had already been adequately covered by Lipsius in his work *Das Attische Recht und Rechtsverfahren* (1915).

The prevailing motif of the book is formalistic rather than jurisprudential. The ought-element in the administration of Greek justice is considered only occasionally and *en passant*. The analytical and legalistic purposes dominate the anthropological, political, social and ethical implications of the research. In fact, it was in response to suggestions that the authors, in the eleventh or final chapter, undertook an estimate of Athenian justice. This was done only "with some misgivings."

The effect of the research is the reconstruction of the remedial phases of ancient Greek positive law up to the time of Aristotle (384-322 B.C.). It is analogous to the work of a paleontologist who has fitted together the bones of a dinosaur. The cleverness of the technique employed may be illustrated by the following sentence: "And by piecing together the information in Homer, the fragments of Draco's Code, and the various pieces of evidence from the fifth and fourth centuries, we have a fairly complete picture, both of the family attitude which started action for homicide and of the various stages in the development of homicide procedure." The legal facts, excavated from the different strata of ancient Greek literature, such as the writings of Aristophanes, the Orators, Aristotle, and the like, have been ordered by grouping them around such jural concepts as litigant, sycophant, special plea, arbitration, witness, oath, homicide, appeal and execution of judgments.

This ingenious work is indeed a monument to the extraordinary skill of Dr. Bonner and Dr. Smith in exhausting Greek literary materials, and in understanding the inner significance of their discoveries. It will unquestionably have lasting reference-value in the world of scholarship. It becomes an indispensable source for students of ancient Greek legal culture. But its appeal will most likely be restricted, for the most part, to the antiquarian, and to that small coterie of legalists, whose interests include the study of remedial formalism more or less for its own sake. That the authors were writing for a relatively small company of juridically inclined intelligentsia may be perhaps presumed from such decisions as not to include translations of the numerous Greek passages which appear throughout the book.

BRENDAN F. BROWN.
Catholic University of America, Washington, D. C.

OTHER BOOKS RECEIVED

Income Tax Simplifier and Account Record Book, by Frank H. Shevit. 1938. New York: B. C. Forbes Publishing Co. Pp. 13. Price $1.00.

Air Law in the Making. Inaugural Address delivered by Dr. D. Goedhuis, Upon Accepting a Lectureship in Air Law at Leiden University on Wednesday, October 19, 1938. 1938. The Hague: Martinus Nijhoff. Pp. 36. Price: Gld. 0.80.

Restatement of the Law of Torts, As Adopted and Promulgated by the American Law Institute at Washington, D. C., May 12, 1938. Volume III. Divisions 3-9. 1938. St. Paul: American Law Institute Publishers. Pp. xxvi, 759.

The Law of Suretyship and Guaranty, by William V. Hagendorn. 1938. Brooklyn-New York. Published by the author. Pp. xv, 126.

The Personality Conception of the Legal Entity, by Alexander Nekam. 1938. Cambridge: Harvard University Press. Pp. 131. Price $2.00.

Credit Manual of Commercial Laws, 1939. 1938. New York: National Association of Credit Men. Pp. vi, 762. Price $6.50.

Economics of Transportation, by D. Philip Locklin. Revised Edition. 1938. Chicago: Business Publications, Inc. Pp. x, 863.

The International Protection of Literary and Artistic Property, in Two Volumes. Volume I: International Copyright and Inter-American Copyright. Volume II: Copyright in the United States of America and Summary of Copyright Law in Various Countries, by Stephen P. Ladas, 1938. New York: The Macmillan Co. Vol. I—pp. xlix, 679. Volume II—pp. ix, 683 to 1273. Price $8.50.

Court Over Constitution: A Study of Judicial Review as an Instrument of Popular Government, by Edward S. Corwin. 1938. Princeton: Princeton University Press. Pp. xi, 273. Price $2.50.

Lawyers and the Promotion of Justice, by Esther Lucile Brown. 1938. New York: Russell Sage Foundation. Pp. 302. Price $1.00.

Robbery by Mail: The story of the U. S. Postal Inspectors, by Karl Baarslag. 1938. New York and Toronto: Farrar & Rinehart, Inc. Pp. 324. Price $2.50.

The Brandeis Way: A Case Study in the Workings of Democracy, by Alpheus Thomas Mason. 1938. Princeton: Princeton University Press. Pp. 336. $3.00.

Marihuana: America's New Drug Problem. A Sociologic Question with Its Basic Explanation Dependent on Biologic and Medical Principles, by Robert P. Walton. 1938. Philadelphia: J. B. Lippincott Company. Pp. ix, 223. $3.00.

Our Eleven Chief Justices: A History of the Supreme Court in Terms of Their Personalities, by Kenneth Bernard Umbreit. 1938. New York and London: Harper & Brothers. Pp. xiv, 539. $3.75.

Elihu Root, by Philip C. Jessup. Volume 1—1845-1909; Volume II—1905-1937. 1938. New York: Dodd, Mead & Company. Pp. Vol. I—xi, 563; Vol. II—vii, 586. $7.50.

Lectures on the American Constitution, by Sir Maurice Sheldon Amos. 1938. New York: Longmans, Green & Company. Pp. ix, 178. $2.50.

The Constitution and What It Means Today, by Edward S. Corwin. 1938. Princeton: Princeton University Press. Pp. xi, 215. $2.00.

The Law of Treaties: British Practice and Opinions, by Arnold D. McNair. 1938. New York: Columbia University Press. Pp. xxix, 578. $7.50.

Some Makers of English Law. The Tagore Dectures 1937-38, by Sir William Holdsworth. 1938. Cambridge, England: At the University Press. New York: The Macmillan Company. Pp. xi, 308.

Handbook of the Cambridge Law School, 1938-1939. Cambridge: Printed for the Board of the Faculty of Law at the University Press. 1938. Pp. viii, 158. To be obtained at The Squire Law Library for Half-a-Crown.

Origin of the Conjugal Community (or Community Property Law) and The Manner of Judgments in and the Laws of Ancient Egypt; Politics and Jurisprudence in Ancient Media, and Government in Ancient Athens, by Calvin Kephart. 1938. Washington, D. C. Privately printed. Pp. 32.

Yale Law Library Publications. No. 6. June 1938. The William Blackstone Collection in the Yale Law Library. A Bibliographical Catalogue, by Catherine Spicer Eller. 1938. New Haven: Yale University Press. Pp. xvii, 113. $1.50.

Principles of the New York Standard Fire Insurance Policy, by Abe. J. Goldin. 1938. Philadelphia: Insurance Publishers. Pp. xiv, 319. $3.00.

Cases on Public Utility Regulation, by Irston R. Barnes, 1938. New York: S. Crofts & Co. Pp. xx, 984. $7.00.

Federal Tax Practice: Practice before the Treasury, Board of Tax Appeals, and Federal Courts, by Robert H. Montgomery. Revised Edition. 1938. New York: The Ronald Press Company. Pp. xviii, 872. $10.00.

Silicosis and Asbestosis, by Various Authors. Edited by A. J. Lanza. 1938. New York: Oxford University Press. Pp. xxvi, 439.

The Senate of the United States: Its History and Practice, by George H. Haynes. (Two Volumes) 1938. Boston: Houghton Mifflin Company. Volume I—Pp. x, 567; Volume II—571-1118. $8.50.

The Law and Religion, by Edwin M. Abbott. 1938. Philadelphia: Dorrance & Company, Inc. Pp. 92. $1.50.

Commentary on Pan American Problems, by Ricardo J. Alfaro. 1938. Cambridge: Harvard University Press. Pp. xii, 98. 50 cents.

The Law Relating to Competitive Trading, including Trade Interference, Price Maintenance, Competition at the Hands of Former Employees and Detriment to Goods and Trade Reputation, by Dorothy Knight Dix. 1938. London: Sweet & Maxwell, Limited. Pp. xx, 224. 15s.

Sir William Blackstone, by David A. Lockmiller. 1938. Chapel Hill: The University of North Carolina Press. Pp. xviii, 308. $3.00.

Equality and the Law, by Louis A. Warsoff. 1938. New York: Liveright Publishing Corporation. Pp. x, 324. $3.00.

Political Philosophies, by Chester C. Maxey. 1938. New York: The Macmillan Company. Pp. xiii, 692. $4.00.

Practicing Law: When, Where and How, by Silvester E. Quindry. 1938. Washington, D. C.: Washington Law Book Co. Pp. vii, 567. $3.75.

Handbook of Latin American Studies: A Selective Guide to the Material Published in 1937 on Anthropology, Art, Economics, Education, Folklore, Geography, Government, History, International Relations, Law, Language and Literature, by a Number of Scholars. Edited by Lewis Hanke. 1938. Cambridge: Harvard University Press. Pp. xv, 635.

NOMINATIONS FOR OFFICERS AND MEMBERS OF THE BOARD OF GOVERNORS OF THE AMERICAN BAR ASSOCIATION

In accordance with Article VIII, Section 1, of the Constitution, the Secretary of the American Bar Association certifies for publication in the American Bar Association Journal that at a meeting of the State Delegates, duly called and held at Chicago, Illinois, on January 10, 1939, at 9:00 A. M., the following persons were unanimously nominated for the following named offices, to be voted upon by the House of Delegates at the annual convention to be held the week of July tenth at San Francisco:

For President: Charles A. Beardsley, California.

For Chairman of the House of Delegates:

For Secretary: Harry S. Knight, Pennsylvania. Thomas B. Gay, Virginia.

For Treasurer: John H. Voorhees, South Dakota.

For Members of the Board of Governors:

First Circuit: George R. Grant, Massachusetts.

Second Circuit: Philip J. Wickser, New York.

Sixth Circuit: Carl V. Essery, Michigan.

Tenth Circuit: G. Dexter Blount, Colorado.

HARRY S. KNIGHT

Secretary, American Bar Association, acting as Secretary of State Delegates.

Federal Income Tax Handbook 1938-1939, by Robert H. Montgomery. 1938. New York: The Ronald Press Company. Pp. xv, 1260. $10.00. (In comb. with ESTATES $15.00.)

Federal Taxes on Estates, Trusts and Gifts 1938-1939, by Robert H. Montgomery. 1938. New York: The Ronald Press Company. Pp. xi, 511. $7.50. (In comb. with INCOME TAX $15.00.)

Legislative History of Federal Income Tax Laws, 1938-1861, by J. S. Seidman. 1938. New York; Prentice-Hall, Inc. Pp. xviii, 1166. $10.00.

The Formative Era of American Law, by Roscoe Pound. 1938. Boston: Little, Brown & Company. Pp. x, 188. $2.00.

Lord Macaulay: Victorian Liberal, by Richmond Croom Beatty. 1938. Norman: University of Oklahoma Press. Pp. xvi, 387. $3.00.

The Legal Aspect of Money. With Special Reference to Comparative and Private International Law, by F. A. Mann. 1938. New York: Oxford University Press. Pp. xxv, 334. $7.00.

Visit, Search, and Seizure on the High Seas: A Proposed Convention of International Law on the Regulation of this Belligerent Right, by Joseph Lohengrin Frascona. 1938. Privately Published. Pp. xiv, 161. Not for sale.

Judgment Intuitive, by Joseph C. Hutcheson, Jr. 1938. Chicago: The Foundation Press, Inc. Pp. vii, 227. $2.00.

JAMES W. RYAN, NEW YORK CITY, WILLIAM R. VALLANCE, WASHINGTON, D.C. JOHN H. WIGMORE, CHICAGO, ILL. JAMES OLIVER MURDOCK, WASHINGTON, D.C. FRANK W. GRINNELL, BOSTON, MASS.

W. WALLACE FRY, MEXICO, MO. KENNETH TEASDALE, ST. LOUIS, MO.

WALTER S. RUFF, CANTON, O. CHARLES W. RACINE, TOLEDO, O., FRED B. H. SPELLMAN, ALVA, OKLA.

WILLIAM LOGAN MARTIN, BIRMINGHAM, ALA. NATHAN WILLIAM MacCHESNEY, CHICAGO, CLARENCE E. MARTIN, MARTINSBURG, W. VA. JOHN PERRY WOOD, LOS ANGELES, CAL.

GEORGE E. BRAND, DETROIT, MICH., STANLEY B. HOUCK, MINNEAPOLIS, MINN.

ILLUSTRATING THE FACT THAT, WHILE LAWYERS STRIVE MIGHTILY, THEY "EAT AND DRINK AS FRIENDS"

DECISIONS ON THE FEDERAL RULES OF CIVIL PROCEDURE

FROM BULLETINS X, XI, XII AND XIII ISSUED BY THE DEPARTMENT OF JUSTICE

RULE 7—Subdivision (c)—Demurrers, Pleas, etc., Abolished

James Jeff Lewis v. United States. Eastern District of Tennessee, TAYLOR, D. J., Dec. 16, 1938.)

The defendant filed a demurrer to the complaint in an action against the Government on a war risk insurance contract which did not show that the action is within the consent of the sovereign, nor that it was brought within the time limited by statute. Demurrer was treated as a motion to dismiss and was sustained.

[Editor's note: The question as to what should be done with demurrers, in view of their abolition by the new Rules, has been variously dealt with. In *New York Life Insurance Co. v. Coldiron* (W. Wash. October 6, 1938) a demurrer was stricken (Bulletin No. 2). In that case, however, it did not appear whether the demurrer was filed prior or subsequently to the effective date of the Rules. In *Shell Petroleum Corporation v. Stueve* (Minn. December 12, 1938) a demurrer was treated as a motion for a more definite statement of the claim (Bulletin No. 9). In *Ashman v. Coleman* (W. Pa., October 24, 1938; Bulletin No. 2), and in the case under discussion (*Lewis v. United States*) a demurrer was treated as a motion to dismiss for failure to state a claim.]

The Equitable Life Assurance Society v. Helen Kit, et al. (Eastern District of Pennsylvania, KIRKPATRICK, D. J., Jan. 9, 1939).

Demurrer filed prior to effective date of the Rules construed as a motion for judgment on the pleadings under Rule 12 (c).

[Editor's Note: The question as to what should be done with demurrers, in view of their abolition by the new Rules, has been variously dealt with. In *New York Life Insurance Co. v. Coldiron* (W. Wash. October 6, 1938) a demurrer was stricken (Bulletin No. 2). In that case, however, it did not appear whether the demurrer was filed prior or subsequently to the effective date of the Rules. In *Shell Petroleum Corporation v. Stueve* (Minn. December 12, 1938) a demurrer was treated as a motion for a more definite statement of the claim (Bulletin No. 9). In *Ashman v. Coleman* (W. Pa. October 24, 1938; Bulletin No. 2), and in *Lewis v. United States* (E. Tenn. December 16, 1938; Bulletin No. 10), a demurrer was treated as a motion to dismiss for failure to state a claim. In the case under discussion (*Equitable Life Assurance Society v. Kit, et al*), a demurrer was treated as a motion for judgment on the pleadings.]

RULE 8—Subdivision (a)—Claims for Relief

Madeline Hardin v. Interstate Motor Freight System, Inc. (Southern District of Ohio, NEVIN, D. J., Jan. 3, 1939.)

In a complaint for negligence, a mere general charge of negligence is sufficient, without specification, as indicated by Rule 8(a) and Form 9 in the Appendix to the Federal Rules of Civil Procedure.

Subdivision (b)—Defenses; Form of Denials

John A. Nordman v. City of Johnson City. (Eastern District of Illinois, WHAM, D. J., Jan. 11, 1939).

1. Averments in an answer that defendant is without information sufficient to form a belief as to the truth of certain allegations in the complaint will be given the effect of a denial and should not be stricken out, even if the facts are seemingly within his knowledge.

2. A motion to strike an affirmative defense which is not responsive to any charge in the complaint should be sustained. (Rule 12 (f)).

3. A motion to make a pleading more definite and certain by setting forth precise dates of payments alleged therein, should be denied, if the information is not essential to the sufficiency of the pleading. If needed before the adverse party can safely plead, the information may be obtained by a bill of particulars. (Rule 12(e))

Subdivision (c)—Affirmative Defenses

Ester Baker v. Clyde A. Sisk, et al. (District of Oklahoma, RICE, D. J., Dec. 17, 1938.)

In view of the fact that the statute of limitations is an affirmative defense to be asserted in a pleading rather than a motion, defendant's motion to dismiss for failure to state a claim which raises the issue of the statute, may therefore be treated as an answer.

Subdivision (e)—Pleading to be Concise and Direct; Consistency

Donald Bicknell, et al. v. Marjorie Fleming Lloyd-Smith. (Eastern District of New York, BYERS, D. J., Dec. 20, 1938).

In a joint action by two apparently unrelated holders of corporate bonds against the Guarantor of such bonds plaintiffs should be required to state in separate counts the alleged causes of action, in view of the fact that one or more affirmative defenses may appear appropriate in answer to one plaintiff but not the other.

RULE 12—Subdivision (a)—Defenses and Objections—When Presented

Food Machinery Corporation v. August Guignard, et al. (District of Oregon, FEE, D. J., December, 1938.)

The court has no power to shorten the time for answer prescribed by Rule 12 (a).

Subdivision (b)—Defenses and Objections, How Presented

Mary A. McConville v. The District of Columbia,

et al. (District of Columbia, LUHRING, J., Dec. 14, 1938.)

A motion to dismiss which requires consideration of matter not appearing in the complaint is analogous to a speaking demurrer under the early equity practice, and should be overruled.

Thomas Pesci, et al. &c. v. F. A. Vieser & Son, Inc. (District of New Jersey, AVIS, D. J., —.)

A motion to dismiss the complaint was considered timely, although filed subsequently to the filing of the answer, in view of the fact that the right to make such a motion was reserved in the answer.

[Editor's Note: It does not appear whether the Court's attention was called to the following provision of Rule 12(b): "A motion making any of these defenses shall be made before pleading if a further pleading is permitted." On the other hand, under Rule 12(c) and Rule 12(h), the point could be raised by a motion for judgment on the pleadings at any time before the trial. Obviously, under the circumstances of this case it would be appropriate to construe the defendant's motion to dismiss as a motion for judgment on the pleadings and thus pass upon the sufficiency of the complaint.]

Ralph S. Herzog v. N. W. Hubard, et al. (United States Court of Appeals for the District of Columbia, Groner, STEPHENS and EDGERTON, J. J., Opinion by GRONER, April 25, 1938.)

Before the effective date of the Rules, defendant's motion to dismiss, in which were joined the defenses of lack of jurisdiction and insufficiency of the complaint, was overruled on the ground that such joinder of defenses constituted a general appearance and a waiver of the defense of lack of jurisdiction.

On appeal the judgment was reversed, the court holding that the joinder of such defenses in the same motion did not constitute a general appearance, and indicating that after the Rules become effective the defendant might challenge the jurisdiction of the court and the sufficiency of the complaint in the same motion without waiving the defense of lack of jurisdiction.

American-Mexican Claims Bureau, Inc. v. Henry Morgenthau, Jr., Secretary of the Treasury, et al. (District of Columbia, LUHRING, J., Jan. 6, 1939).

The joinder of a motion to dismiss for lack of jurisdiction over the person with a motion to dismiss for want of equity and for failure to join indispensable parties defendant, does not waive the jurisdictional defense.

International Molders Union of North America v. National Labor Relations Board. (Eastern District of Pennsylvania, KIRKPATRICK, D. J., Jan. 9, 1939).

In an action in equity brought before the effective date of the Rules, a motion to quash the subpoena on the grounds of defective service and want of jurisdiction, was treated as a motion to dismiss for lack of jurisdiction over the person.

Joseph E. Wheeler v. B. P. Lientz and B. P. Lientz Mfg. Co. (Western District of Missouri, COLLET, D. J., Jan. 11, 1939).

1. Rule 12 (b) does not contain an exhaustive enumeration of motions permitted under the new Rules and the fact that it does not mention motions for security for costs does not prevent use of such motions under proper circumstances.

2. A motion for security for costs is not a "defense" nor an "objection" under Rule 12 (h) and is, therefore, not waived, if not presented by one of the motions enumerated in Rule 12 (b).

3. Rule 83 constitutes authority for the continuation in effect of rules previously established by the District Courts and which are not inconsistent with the Federal Rules.

Subdivision (e)—Motion for More Definite Statement or for Bill of Particulars

Maria Mendola v. The Carborundum Company. (Western District of New York, KNIGHT, D. J., Dec. 20, 1938).

1. Plaintiff required to make complaint more definite and certain by setting forth pertinent dates, from which it may be determined whether or not the claim is barred by the statute of limitations.

2. In an action for negligence against deceased's employer, allegations that certain provisions of the State Workmen's Compensation Law are unconstitutional, are redundant and immaterial if it appears that such provisions do not apply to plaintiff's claim, and defendant's motion to strike such allegations should be granted. (Rule 12 (f))

Donald Bicknell, et al. v. Marjorie Fleming Lloyd-Smith. (Eastern District of New York, BYERS, D. J., Dec. 20, 1938).

1. In an action against a guarantor of corporate bonds, defendant should not be permitted by motion for more definite statement or for a bill of particulars to obtain the names of the original vendees of the bonds, the consideration paid therefor, the name of the seller of the bonds to plaintiff and the consideration paid, and a statement as to whether the plaintiffs knew of the guarantee at the time of their purchase. Such information should be sought under the discovery provisions of the Rules.

2. In a joint action by two apparently unrelated holders of corporate bonds against the guarantor of such bonds plaintiffs should be required to state in separate counts the alleged causes of action, in view of the fact that one or more affirmative defenses may appear appropriate in answer to one plaintiff but not to the other. (Rule 8(e))

John A. Nordman v. City of Johnson City. (Eastern District of Illinois, WHAM, D. J., Jan. 11, 1939).

A motion to make a pleading more definite and certain by setting forth precise dates of payments alleged therein, should be denied, if the information is not essential to the sufficiency of the pleading. If needed before the adverse party can safely plead, the information may be obtained by a bill of particulars.

Subdivision (f)—Motion to Strike

Maria Mendola v. The Carborundum Company. (Western District of New York, KNIGHT, D. J., Dec. 20, 1938).

In an action for negligence against deceased's employer, allegations that certain provisions of the State Workmen's Compensation Law are unconstitutional, are redundant and immaterial if it appears that such provisions do not apply to plaintiff's claim, and defendant's motion to strike such allegations should be granted.

John A. Nordman v. City of Johnson City. (Eastern District of Illinois, WHAM, D. J., Jan. 11, 1938).

A motion to strike an affirmative defense which is not responsive to any charge in the complaint should be sustained.

Subdivision (h)—Waiver of Defenses

Joseph E. Wheeler v. B. P. Lientz and B. P. Lientz Mfg. Co. (Western District of Missouri, COLLET, D. J., Jan. 11, 1939).

A motion for security for costs is not a "defense" nor an "objection" under Rule 12 (h) and is, therefore, not waived if not presented by one of the motions enumerated in Rule 12 (b).

RULE 14—Subdivision (a)—When Defendant May Bring in Third Party

R. E. King v. A. W. Shepherd v. The National Mutual Casualty Company. (Western District of Arkansas, Fort Smith Division, RAGON, D. J., Dec. 31, 1938).

In an action brought in the Western District of Arkansas by a resident of that District against a citizen of Missouri to recover damages caused by an automobile accident, defendant brought in his insurer, a citizen of Oklahoma, by a third-party complaint. Third-party defendant moved to dismiss third-party complaint for improper venue. Held, that the third-party complaint presented a severable controversy and, therefore, in the light of Rule 82 prohibiting construction of the Rules so as to extend the venue of actions, the Western District of Arkansas was not the proper venue for the third-party proceeding, and hence motion was granted. [EDITORIAL NOTE: The decision of the court apparently follows the view adopted by cases decided prior to the effective date of the new Rules under the Conformity Act, in connection with third party practice provisions of state laws. *Galveston, Harrisburg & San Antonio Railway Co. v. Hall* (C.C.A. 5th), 70 F. (2d) 608; *Wilson* v. *United American Lines* (S.D. N.Y.), 21 F. (2d) 872; *Sperry* v. *Keller Transportation Line* (S.D. N.Y.), 28 F. (2d) 897.

On the other hand, it has been urged that under the third party practice provided by the new Rules the controversy between the third party plaintiff and the third party defendant should be deemed ancillary to the suit as originally brought and not independent of or severable from it. If this view were adopted, then if the jurisdictional and venue requirements are satisfied as between the original plaintiff and the original defendant, the institution of the third party complaint would be permitted irrespective of whether or not the jurisdictional and venue requirements would be met if the third party proceeding were treated separately. Article by Clark and Moore on "A New Federal Procedure," 44 Yale Law Journal 1921, 1322; 1 Moore's Federal Practice 780-782; Article by Shulman and Jaegerman on "Some Jurisdictional Limitations on Federal Procedure," 45 Yale Law Journal 393, 420-1.

The adoption of the more liberal practice might perhaps be deemed in the interests of the aims of the new Rules. It may be contended that such a result would not be inconsistent with Rule 82, since if the third party proceeding is deemed ancillary, the venue requirements are not extended.]

RULE 17—Subdivision (a)—Real Party in Interest

Lloyd Moore, Inc., to use etc. v. Burney Schwartz. (Eastern District of Pennsylvania, DICKINSON, J., Dec. 27, 1938.)

1. In an action in which there is a nominal plaintiff and a "use" plaintiff, the residence of the former is determinative of the question whether the requisite diversity of citizenship exists for jurisdictional purposes.

2. The requirement that every action shall be prosecuted in the name of the real party in interest does not necessarily preclude the bringing of an action by one party "to the use" of another, in cases in which actions were heretofore brought in that manner.

RULE 18—Joinder of Claims and Remedies

Subdivision (a)—When Depositions May Be Taken

Roger White v. Charles Dallas Reach, et al. (Southern District of New York, GODDARD, D. J., Jan. 10, 1939).

Complaint alleged in the first cause of action an infringement of a copyrighted radio program, in the second cause a conspiracy to prevent plaintiff from producing the program, and in the third cause one of the defendants was charged with having induced two other defendants to breach their contract with plaintiff. Held, that the second and third causes of action as to which there was separately a lack of jurisdiction, were not so inseparably connected with the infringement cause as to constitute proper joinder of claims, and motions to dismiss them for lack of jurisdiction were granted.

RULE 26—Subdivision (a)—When Depositions May Be Taken

Roger White v. Charles Dallas Reach, et al. (Southern District of New York, GODDARD, D. J., Jan. 10, 1939).

Rule 26 regarding examinations before trial held applicable in copyright cases on the ground that Rule 1 of the Copyright Rules provides that existing rules of equity practice, which are now contained in the Federal Rules of Civil Procedure, shall be enforced so far as they may be applicable in copyright suits.

Subdivision (b)—Scope of Examination

Arden L. Norton, et al v. Cooper Jarrett, Inc., Joseph B. Wilson. (Northern District of New York, COOPER, D. J., Dec. 28. 1938.)

A party is not entitled to examination before trial on matters within his own knowledge nor on matters admitted in adversary's pleadings.

R. E. Thompson v. Oil Refineries, Inc., et al. (Western District of Louisiana, DAWKINS, D. J., Jan. 11, 1939).

During the taking of a deposition under Rule 26 in an action to recover for the wrongful taking of property, a witness who had denied that defendants had taken any such property, should, nevertheless, be required to furnish the names of persons to whom other similar property was sold by defendants.

Emma Benevento et al. v. A. & P. Food Stores, Inc. (Eastern District of New York, MOSCOWITZ, D. J., Jan. 14, 1939).

On an examination before trial defendant should be required to give any testimony which would be admissible upon the trial of the action, notwithstanding the fact that the information sought is within the knowledge of the plaintiff.

RULE 28—Persons Before Whom Depositions May Be Taken—Subdivision (c)—Disqualification for Interest

Frank D. Laverett v. The Continental Briar Pipe Co., Inc. (Eastern District of New York, BYERS, D. J., Dec. 28, 1938.)

Stipulation that a deposition shall be taken before a person otherwise disqualified under Rule 28(c) operates as a waiver of such disqualification and a motion to suppress the evidence already taken should be overruled.

RULE 29—Stipulations Regarding the Taking of Depositions

Frank D. Laverett v. The Continental Briar Pipe Co., Inc. (Eastern District of New York, BYERS, D. J., Dec. 28, 1938.)

1. Stipulation that a deposition shall be taken before a person otherwise disqualified under Rule 28(c) operates as a waiver of such disqualification and a motion to suppress the evidence already taken should be overruled (Rules 28(c), 29 and 32(d)).

2. Although a party stipulates as to the officer before whom a deposition shall be taken, he should be relieved of his stipulation as to further taking of testimony if it appears subsequently that such officer is disqualified and there are misgivings as to the fidelity with which the functions of the office have been performed. (Rule 29.)

RULE 30—Depositions Upon Oral Examination—Subdivision (a)—Notice of Examination: Time and Place

Arden L. Norton, et al v. Cooper Jarrett, Inc., Joseph B. Wilson. (Northern District of New York, COOPER, D. J., Dec. 28, 1938.)

1. In an action for negligence, it is proper for the plaintiff to examine the defendant and witnesses as to the acts said to constitute negligence. For example, in an action based on a collision between two vehicles, an examination may be had on the question whether the defendant's vehicle was mechanically defective.

2. The court may fix the place of examination before trial as to non-residents of the district and the place of their residence is immaterial so long as they may be reached by the process of the court. Persons residing in Missouri, however, should not be compelled to attend such examination in New York and parties should not be so compelled without adequate provision for their expenses. (Rule 45(d)(2)).

3. Although neither Rule 30 nor Rule 45 requires that notice of examination before trial shall state the name of the person before whom the examination is to take place, the better practice is that the notice should name such person. (Rules 30 and 45.)

4. An examination before trial should not take place in the office of the attorney for either party.

5. A party is not entitled to examination before trial on matters within his own knowledge nor on matters admitted in adversary's pleadings. (Rule 26(b)).

[Editor's Note: In view of the broad language of Rule 26(b) and in view of the fact that one of the purposes of an examination before trial is to secure evidence in support of the examining party's case and another is to ascertain the claims and assertions of the adverse party, it may perhaps be successfully contended that it is an undue limitation of Rule 26(b) not to permit such an examination merely because the facts are within the knowledge of the examining party.

Support to such a contention is lent by the statement of E. R. Sunderland, a member of the Advisory Committee, in "Proceedings of the Institute on Federal Rules, Cleveland, Ohio, July 21-23, 1938," p. 283.

In *Nichols v. Sanborn Company*, decided by Ford, J. in the District of Massachusetts on September 30, 1938 (Bulletin No. 1), it was stated that "It seems apparent that the distinction between discovery of 'evidentiary' facts and 'ultimate or material' facts is abolished as is also the holding . . . that discovery could be obtained only of matters exclusively or peculiarly within the knowledge or control of the adverse party."

A similar broad construction was placed on the rule by Moscowitz, J. in *Laverett v. Continental Briar Pipe Company*, decided in the Eastern District of New York on October 26, 1938 (Bulletin No. 3).

Moreover, the notice for the taking of depositions need not specify the subject matter of the proposed examination. *Bennett v. Westover, Inc.* (S. D., N. Y.), December 13, 1938 (Bulletin No. 9); *Savolis v. National Bank of Greece* (S. D., N. Y.), November 16, 1938 (Bulletin No. 9).]

RULE 32—Effect of Errors and Irregularities in Depositions—Subdivision (d) — As to Completion and Return of Deposition

Frank D. Laverett v. The Continental Briar Pipe Co., Inc. (Eastern District of New York, BYERS, D. J., Dec. 28, 1938.)

Stipulation that a deposition shall be taken before a person otherwise disqualified under Rule 28(c) operates as a waiver of such disqualification and a motion to suppress the evidence already taken should be overruled.

RULE 33—Interrogatories to Parties

George W. Pierce v. Submarine Signal Company. (District of Massachusetts, SWEENEY, D. J., Jan. 5, 1939).

1. In a patent suit in a district court, plaintiff is not entitled to answers to interrogatories relating to apparatus alleged to have been manufactured for the United States in view of the fact that the Court of Claims has sole and exclusive jurisdiction over such claims. (Rule 33)

2. In a suit to recover for patent infringement, Rule 34 provides for production of documents for inspection, etc., should not be applied to permit plaintiff to obtain disclosure of all equipment manufactured by the defendant. Such inquiry is too broad and sweeping. (Rule 34)

3. Motion for summary judgment should be denied as to a claim over which court lacks jurisdiction. (Rule 56 (b)).

F. & M. Skirt Co., Inc. v. A. Wimpfheimer & Bro., Inc. (District of Massachusetts, MCLELLAN, D. J., Jan. 4, 1939).

1. In an action for damages for breach of warranty in purchase of goods, defendant should be required to answer an interrogatory calling for the name of defendant's representative who engaged in the negotiations leading up to the sale. That such an answer may disclose the name of a witness is no objection.

2. Answers to interrogatories may state the "belief" or "understanding" of the person answering when his answer depends not on his own recollection but upon what others tell him.

C. F. Simonin's Sons, Inc. v. American Can Company. (Eastern District of Pennsylvania, KIRKPATRICK, D. J., Jan. 6, 1939).

In an action commenced before the effective date of the Rules by the issuance of summons under state practice without filing a complaint, plaintiff served interrogatories under Rule 33 subsequently to such date. Held, that it is not feasible to apply the Rules to an action begun before their effective date, in which no complaint has been filed and the interrogatories should be dismissed.

RULE 34—Discovery and Production of Document and Things for Inspection, Copying or Photographing

United States v. Aluminum Company of America, et al. (Southern District of New York, CAFFEY, D. J., Jan. 6, 1939).

Documents produced by defendant in response to a subpoena duces tecum may not be inspected by plaintiff under Rule 34 in advance of an inspection and determination by the court that they contain evidence material to the issues. The question of materiality is not to be determined by mere examination of the subpoena.

George W. Pierce v. Submarine Signal Company. (District of Massachusetts, SWEENEY, D. J., Jan. 5, 1939).

In a suit to recover for patent infringement, Rule 34 providing for production of documents for inspection, etc., should not be applied to permit plaintiff to obtain disclosure of all equipment manufactured by the defendant. Such inquiry is too broad and sweeping.

William Leader, et al v. Apex Hosiery Co. (United States Circuit Court of Appeals for the Third Circuit, DAVIS, MARIS and CLARK, C. J., Jan. 3, 1928.)

An order of the District Court under Rule 34 for the discovery and production of documents for inspection, etc., is an interlocutory order and therefore not appealable.

RULE 41—Subdivision (a)—Voluntary Dismissal; Effect Thereof

Ester Baker v. Clyde A. Sisk, et al. (District of Oklahoma, RICE, D. J., Dec. 17, 1938.)

Plaintiff's motion to dismiss without prejudice filed after service of an answer which discloses that the suit is barred by the statute of limitations, should be denied.

Subdivision (d)—Costs of Previously-Dismissed Action

Ancil Ayers, Admr. v. Mark S. Conser, et al. (Eastern District of Tennessee, TAYLOR, D. J., Dec. 10, 1938).

A motion to require plaintiff to pay costs of a prior action voluntarily dismissed wherein the cause of action and the parties were the same, should be denied in the discretion of the court, if it appears that the prior action was dismissed because of interposition by defendant of objections in respect of service for the purpose of delaying or preventing the service of process.

RULE 45—Subdivision (d)—Subpoena for Taking Depositions; Place of Examination

Arden L. Norton, et al v. Cooper Jarrett, Inc., Joseph B. Wilson. (Northern District of New York, COOPER, D. J., Dec. 28, 1938.)

The court may fix the place of examination before trial as to non-residents of the district and the place of their residence is immaterial so long as they may be reached by the process of the court. Persons residing in Missouri, however, should not be compelled to attend such examination in New York and parties should not be so compelled without adequate provision for their expenses.

RULE 49—Subdivision (a) Special Verdicts

Manufacturers Casualty Insurance Company, a corporation v. Erwin R. Roach, et al. (District of Maryland, CHESNUT, D. J., Jan. 4, 1939).

Rule 49 in regard to "special verdicts and interrogatories" invoked in an action for a declaratory judgment by an insurance company to secure declaration that it was not liable on a policy because of a breach by the insured, the question at issue being whether the insurer had waived the breach.

RULE 52—Findings by the Court—Subdivision (a)—Effect

The United States of America v. Bethlehem Steel Corporation, et al. (Eastern District of Pennsylvania, DICKINSON, D. J., December, 1938.)

The court need not make findings of fact and conclusions of law in passing on the report of a referee, which contains findings.

RULE 54—Subdivision (d)—Costs

Johnson Metal Products Co. and Detroit Steel Products Co. v. Lundell-Eckberg Mfg. Co., Inc. (Western District of New York, KNIGHT, D. J., Nov. 20, 1938.)

In a patent suit which was tried and in which the mandate on appeal was filed before September 16, 1938, the allowance of costs should be governed by the old Rules, which made such allowance discretionary, rather than by Rule 54(d), in view of the fact that the court expresses doubt as to whether the later rule makes the imposition of costs mandatory or discretionary.

RULE 56—Summary Judgment—Subdivision (b) for Defending Party

George W. Pierce v. Submarine Signal Company. (District of Massachusetts, SWEENEY, D. J., Jan. 5, 1939).

Motion for summary judgment should be denied as to a claim over which court lacks jurisdiction.

RULE 56—Summary Judgment—Subdivision (c)—Motion and Proceedings Thereon

Ester Baker v. Clyde A. Sisk, et al. (District of Oklahoma, RICE, D. J., Dec. 17, 1938.)

1. Defendant's motion for summary judgment should be granted when the record in the case discloses that plaintiff cannot successfully refute defendant's plea of the statute of limitations. (Rule 56(c)).

2. In view of the fact that the statute of limitations is an affirmative defense to be asserted in a pleading rather than a motion, defendant's motion to dismiss for failure to state a claim which raises the issue of the statute, may therefore be treated as an answer. (Rule 8(c)).

3. Plaintiff's motion to dismiss without prejudice filed after service of an answer which discloses that the suit is barred by the statute of limitations, should be denied. (Rule 41(a)).

RULE 59—New Trials—Subdivision (d)—On Initiative of Court

Schick Dry Shaver, Inc. et al v. General Shaver Corporation et al. (District of Connecticut, THOMAS, D. J., Dec. 30, 1938.)

The limitations of Rule 59(d) governing new trials on the initiative of the court are not applicable to an application to reopen a case for the purpose of taking additional testimony, while it is under advisement.

RULE 73—Appeal to a Circuit Court of Appeals—Subsection (a)—How Taken

William McCrone v. United States of America. (District of Montana, WILBUR, C. J., Dec. 13, 1938.)

An appeal from an order of the District Court finding appellant guilty of civil contempt, taken prior to Sept. 16, 1938, in the manner provided for appeals from a criminal judgment, by giving notice of appeal, instead of in the manner provided for appeals from judgments in civil actions, by filing a petition and securing an allowance of the appeal, came on for hearing after the effective date of the Rules. Held the appeal should be dismissed.

Dissenting opinion stated that since the cause came on for hearing after the effective date of the Rules, the provisions of Rule 73, permitting appeals in civil cases to be taken by merely filing notice of appeal, should be applied and that, therefore, the appeal should be decided on the merits.

RULE 74—Joint or Several Appeals to the Supreme Court or to a Circuit Court of Appeals; Summons and Severance Abolished

Frank J. Schaffer v. Pennsylvania Railroad Company. (United States Court of Appeals for the Seventh Circuit, TREANOR, C. J., Jan. 6, 1939).

In an action against two joint tort-feasors, a verdict was directed in favor of one defendant, and a verdict was rendered by the jury against the other defendant. The plaintiff appealed, assigning as error the direction of the verdict in favor the first defendant. Held, the rendition of judgment against the second defendant, does not bar right to prosecute appeal as against the first, especially in the light of Rule 74 abolishing summons and severance.

RULE 81—Subdivision (a)—To What Proceedings Applicable

Roger White v. Charles Dallas Reach, et al. (Southern District of New York, GODDARD, D. J., Jan. 10, 1939).

1. Rule 26 regarding examinations before trial held applicable in copyright cases on the ground that Rule 1 of the Copyright Rules provides that existing rules of equity practice, which are now contained in the Federal Rules of Civil Procedure, shall be enforced so far as they may be applicable in copyright suits. (Rules 26 (a) and 81 (a))

2. Complaint alleged in the first cause of action an infringement of a copyrighted radio program, in the second cause a conspiracy to prevent plaintiff from producing the program, and in the third cause one of the defendants was charged with having induced two other defendants to breach their contract with plaintiff. Held, that the second and third causes of action as to which there was separately a lack of jurisdiction, were not so inseparably connected with the infringement cause as to constitute proper joinder of claims, and motions to dismiss them for lack of jurisdiction were granted. (Rule 18)

United States v. Certain Lands in Jo Daviess County, Illinois, et al. (Northern District of Illinois—).

In a proceeding by the Government for the condemnation of land, defendants' motion for an order for discovery and for the production by the Government of documents under Rule 34, was denied on the ground that by virtue of Rule 81 (a) the Rules are not applicable to condemnation proceedings, except on appeal.

RULE 82—Jurisdiction and Venue Unaffected

R. E. King v. A. W. Shepherd v. The National Mutual Casualty Company. (Western District of Arkansas, Fort Smith Division, RAGON, D. J., Dec. 31, 1938).

In an action brought in the Western District of Arkansas by a resident of that District against a citizen of Missouri to recover damages caused by an automobile accident, defendant brought in his insurer, a citizen of Oklahoma, by a third-party complaint. Third-party defendant moved to dismiss third-party complaint for improper venue. Held, that the third-party complaint presented a severable controversy, and, therefore, in the light of Rule 82 prohibiting construction of the Rules so as to extend the venue of actions, the Western District of Arkansas was not the proper venue for the third-party proceeding, and hence motion was granted.

RULE 83—Rules by District Courts

Joseph E. Wheeler v. B. P. Lientz and B. P. Lientz Mfg. Co. (Western District of Missouri, COLLET, D. J., Jan. 11, 1939).

Rule 83 constitutes authority for the continuation in effect of rules previously established by the District Courts and which are not inconsistent with the Federal Rules.

RULE 86—Effective Date

Johnson Metal Products Co. and Detroit Steel Products Co. v. Lundell-Eckberg Mfg. Co., Inc. (Western District of New York, KNIGHT, D. J., Nov. 30, 1938.)

In a patent suit which was tried and in which the mandate on appeal was filed before Sept. 16, 1938, the allowance of costs should be governed by the old Rules, which made such allowance discretionary, rather than by Rule 54(d), in view of the fact that the court expresses doubt as to whether the latter rule makes the imposition of costs mandatory or discretionary.

William McCrone v. United States of America. (United States Circuit Court of Appeals for the Ninth Circuit, WILBUR, HANEY and HEALY, Cir. Judges, Opinion by WILBUR, C. J., Dec. 13, 1938.)

An appeal from an order of the District Court finding appellant guilty of civil contempt, taken prior to Sept. 16, 1938, in the manner provided for appeals from a criminal judgment, by giving notice of appeal, instead of in the manner provided for appeals from judgments in civil actions, by filing a petition and securing an allowance of the appeal, came on for hearing after the effective date of the Rules. *Held*, the appeal should be dismissed.

Dissenting opinion stated that since the cause came on for hearing after the effective date of the Rules, the provisions of Rule 73, permitting appeals in civil cases to be taken by merely filing notice of

appeal, should be applied and that, therefore, the appeal should be decided on the merits.

John J. Brennan v. Lumbermen's Mutual Casualty Company. (District of Massachusetts, FORD, D. J., Dec. 16, 1938.)

On a demurrer filed more than two years before the effective date of the Rules, in an action for slander, it was held not feasible to apply the new Rules and the sufficiency of the declaration was determined in accordance with the law of the state as it existed prior to Sept. 16, 1938.

C. F. Simonin's Sons, Inc. v. American Can Company. (Eastern District of Pennsylvania, KIRKPATRICK, D. J., Jan. 6, 1939).

In an action commenced before the effective date of the Rules by the issuance of summons under state practice without filing a complaint, plaintiff served interrogatories under Rule 33 subsequently to such date. Held, that it is not feasible to apply the Rules to an action begun before their effective date, in which no complaint has been filed and the interrogatories should be dismissed. (Rule 33)

AMERICAN LAW SCHOOL ASSOCIATION MEETS

THE Association of American Law Schools held its thirty-sixth annual meeting at the Hotel Stevens in Chicago, December 29-31, inclusive. Baylor University Law School and the University of Kansas City School of Law were admitted to membership, making the total membership ninety-one schools.

At the first session, the President, H. W. Arant, of the Ohio State University, delivered an address in which he urged much closer cooperation among courts, bar associations, boards of bar examiners and law teachers. He asserted that without the active support of practicing lawyers schools cannot induce courts or legislatures to adopt better standards for admission to the Bar, and that, if law teachers and bar examiners do not understand each other's aims and objectives, bar examinations are likely to be inadequate tests of the development of the particular qualities at which law schools aim.

He suggested that the Association study and formulate a list of those academic subjects that are most important as a preparation for legal study and practice.

He emphasized the necessity of law schools clearly recognizing that they have a duty to discover and drop from their rolls students who appear to be definitely unpromising after a reasonable trial and urged that the Association emphatically declare a policy against its members' admitting students who, because of scholastic difficulties, are ineligible to continue legal study in schools previously attended.

He stressed the usefulness and importance of such publications as "Selected Readings on the Law of Contracts" and "Selected Essays on Constitutional Law," both of which were compiled by committees of the Association, and recommended that the Association keep two or three of these projects under way simultaneously instead of one at a time as heretofore.

He stated that the time had come when the Association must consider and declare its policy with reference to the admission to membership of law schools that offer only night instruction, as well as those whose enrollment is predominately in the night division.

One of the general meetings was devoted to a symposium on Administrative Procedure. The general topic discussed was "To What Extent Can There Be Formulated Rules With Respect to What Constitutes a Fair Administrative Hearing Which Are Generally Applicable to Different Administrative Tribunals and to Different Kinds of Administrative Action." The discussion was opened by Professor Ralph Fuchs, of Washington University Law School, who discussed recent decisions and stated the problems as he saw them. There were then discussions of the procedure followed by the National Labor Relations Board, by its Chairman, J. Warren Madden, and of the procedure followed by the Securities and Exchange Commission, by its General Counsel, Chester T. Lane. Mr. Elmer A. Smith, General Counsel for the Illinois Central Railroad, discussed procedure before the Interstate Commerce Commission. An interesting and stimulating paper was then presented by Mr. Ralph Horween, formerly with the Petroleum Administration. These papers were then discussed by Professor Ray A. Brown, of the University of Wisconsin, and Dean James M. Landis, of the Harvard Law School.

Another general session was devoted to the program arranged by the Round Table on Public Utilities and Transportation. The opening paper, "The T.V.A. as a Factor in Public Utility Regulation," was read by Mr. James Lawrence Fly, General Counsel of the Tennessee Valley Authority. Mr. Fly distributed copies of a large folder which contained maps and photographs which were used as exhibits in the case then before the United States Supreme Court. Following Mr. Fly, an address was given by Mr. Francis X. Welch, Editor of the Public Utilities Fortnightly. While he did not take direct issue with many of the statements of Mr. Fly, Mr. Welch presented a different point of view on the problem involving the controversy between the T.V.A. and the private electric companies. Professor Robert L. Hale, of Columbia University, read a paper in which he pointed out the fallacies inherent in the "reproduction cost" theory of "valuation" in public utility rate cases. Dr. John Bauer, Director of the American Public Utilities Bureau, gave a forceful talk in which he presented the desirability of legislation which would eliminate the difficulties of the present ineffectual valuation procedure. He advocated the legislative establishment of a rate base composed of the present value of existing property and the prudent investment cost of all thereafter acquired.

The Round Table Council on Business Associations presented a program which was made one of the general sessions. The Hon. Joseph C. O'Mahoney, United States Senator from Wyoming, opened the meeting with a discussion of "Federal Charters or Licenses for National Commerce." While recent legislation in the form of the Securities Act and the Securities Exchange Act has closed some of the gaps in corporate skullduggery, he said, there is need for further regulation in the form of a federal incorporation act or of a federal licensing act. The extension of the concept of what constitutes interstate commerce in the recent holdings involving the National Labor Relations Board and the growing concept of what is included in the federal police power where economic damage is apparent warrant a tentative assumption that the suggested legislation would be held constitutional. Senator O'Mahoney placed much emphasis upon the necessity

of making the corporate directors trustees in a real sense to their stockholders. He suggested that there ought to be some group to represent the minority stockholders; that there should be frequent, and rather exhaustive, reports made to the stockholders by the corporation; that there should be more democracy in the sense that the voting right should be available to all rather than limited to a few who, as a rule, do not contribute the major part of the capital. Professor Edward Jennings, of the University of Minnesota, doubted whether the N. L. R. B. decisions would be taken by courts as fair analogies in the field under discussion and, consequently, whether the suggested legislation would be held to be constitutional. He felt, however, that there must be definite restrictions somewhere upon past corporate practices of a vicious sort.

The discussion of Senator O'Mahoney's paper was led by Mr. Robert H. O'Brien, Assistant General Counsel of the Securities and Exchange Commission, who pointed out the limitations upon protection afforded by the Federal Acts involved. He emphasized the dangers of "paid-in surplus" which is possible under many state statutes today. The remedies he said, in cases involving overvaluation of assets and promoters' profits, are highly impractical. Inequitable are the differences in dissolution and dividend rights when some shares are sold at $100 par and others of the no-par variety may be sold, with some limitations, at any price. There must be, he thought, more adequate remedies in the case of a sale by a corporation of all of its assets and in merger and consolidation. He agreed with Senator O'Mahoney that there must be more democracy in the corporate structure by a wide voting power.

Professor Clarence M. Updegraff, State University of Iowa, and Associate Counsel of the National Association of Manufacturers, was concerned over the future of business men who from day to day are required to conform to new regulations, wise or unwise, and can never quite know whether their contemplated action for the succeeding week will be legal or illegal. He spoke for simpler and fewer regulatory acts and for a sufficient clarity and certainty in such legislation so that business might be carried on without the burden of uncertainty and fear.

The discussions at the general sesions will be printed in the Handbook of the Association, which will be available about March first.

Round Tables were also held, in smaller groups, on Library Problems, Property and Status, Remedies, Comparative Law, Torts and Special Problems of the Smaller Schools.

At a luncheon given by the Chicago Bar Association to the delegates attending the meeting, Dean Everett Fraser, of the University of Minnesota Law School, talked on the subject, "The Bar and Public Confidence," in which he urged the need of a smaller and better bar and a new conception of the place of law and the lawyer in our society.

The election of officers took place at the final general session, at which Professor Wilbur Cherry, of the University of Minnesota Law School, became President. Professor Edmund Morgan of Harvard University was elected President-Elect, and Professor Harold Shepherd, of the University of Cincinnati, Secretary-Treasurer. Professor Clarence Morris, of the University of Wyoming, and Dean Thomos C. Kimbrough, of the Universtiy of Mississippi, became members of the Executive Committee.

Special Train to San Francisco

Announcement by the Tranportation Committee

LETTERS received from members in response to the inquiries appearing in the November issue of the JOURNAL, indicated that the majority of those who responded were interested in going from Chicago to San Francisco over the central route, and returning via the northern route.

Accordingly the Transportation Committee has decided that the American Bar Association Special Train will leave Chicago on Sunday, July 2nd, about noon, spend Monday, July 3rd, in Estes and Rocky Mountain National Park, stopping for lunch at the Hotel Stanley; leave Denver Monday evening, July 3rd, arriving in Sun Valley, Idaho, the noon of July 4th, remain in Sun Valley until the early afternoon of July 6th; arrive Lake Tahoe the morning of July 7th; spend the day and early evening at Lake Tahoe, arriving in San Francisco the morning of Saturday, July 8th. This will give the members an opportunity to see something of the Fair before the meetings of the Association start, and to be on hand for the preliminary meetings scheduled for Sunday, July 9th.

The Committee is still considering the possibility of spending another day enroute, which would mean that the "Special" would arrive in San Francisco Sunday morning, July 9th.

On the return trip the Special Train will leave San Francisco, Saturday evening, July 15th, after the close of the convention, spend Sunday at Crater Lake, Oregon; Monday in Rainier Park, Washington; Tuesday a trip from Seattle to Victoria (those who prefer may spend the night and second day in Rainier National Park); Wednesday visit the Grand Coulee Dam; Thursday and Friday in Glacier National Park returning from there via the Twin Cities and Milwaukee, arriving in Chicago Sunday morning, July 23rd.

This trip will be an all-expense tour from Chicago to San Francisco, and from San Francisco back to Chicago, but will not include any expenses in San Francisco. Members can join the party en route at Omaha, Denver, Sun Valley or Ogden. It will also be possible to make the trip one way—from Chicago to San Francisco, or from San Francisco to Chicago.

The itinerary, with a more complete description of the trip and accurate figures as to cost, will be available early in February.

Considerable interest has been evinced in post-convention trips by steamer to Honolulu and to Alaska. Arrangements have been made for a special party sailing from San Francisco for Honolulu on Friday evening, July 14th, at 5:00 P. M., spending nine days on the Island and returning to San Francisco, August 2nd, and for a party to Alaska, leaving Seattle on Wednesday, July 19th and returning to Seattle, Monday, July 31. Descriptive folders giving the cost of the Hawaiian and Alaskan trips will be available upon request to the Headquarters Office in Chicago.

All requests for information and reservations should be addressed to the Transportation Committee, 1140 North Dearborn Street, Chicago, Illinois.

ARRANGEMENTS FOR ANNUAL MEETING, SAN FRANCISCO, CALIF.,

July 10-14, 1939

Headquarters—Palace Hotel

Hotel accommodations, all with bath, are available as follows:

	Single for 1 person	Double (dbl. bed) 2 persons	Twin Beds for 2 persons	Parlor Suites
Palace	(All space exhausted)			
Bellevue	3.50	5.00	6.00	8- 10
Canterbury	3.50- 4.00	5.00- 6.00	7.00	10
Clift	5.00	7.00	8.00- 9.00	20
Drake-Wiltshire	3.50	5.50	7.00	
El Cortez	3.50- 4.50	4.50- 5.50	6.00- 7.00	10- 15
Empire	4.00- 5.00	6.00- 7.00	7.00- 8.00	10- 12
Fairmont	4.00- 8.00	6.00- 10.00	7.00- 12.00	20
Mark Hopkins	5.00- 7.00	7.00- 9.00	8.00- 12.00	20- 25
Maurice	3.50- 4.00	5.00- 6.00	7.00	12
Plaza	3.50	6.00	6.50	
St. Francis	... ...	7.00- 8.00	8.00- 12.00	16- 30
Sir Francis Drake	5.00- 7.00	7.00- 9.00	8.00- 10.00	25- 30
Stewart	3.00- 4.00	4.50- 6.00	4.50- 6.00	7
Western Women's Club (for women only)	3.50		5.00	
Whitcomb	4.50	6.00- 8.00	7.00- 9.00	10- 12

EXPLANATION OF TYPE OF ROOMS

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

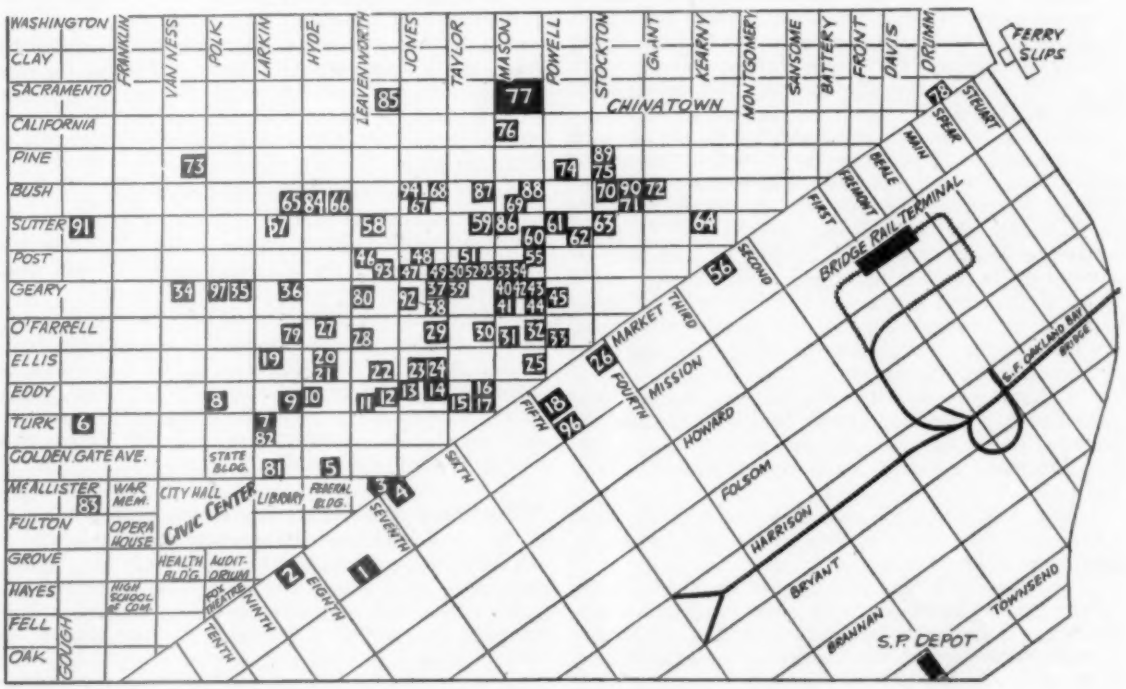
A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, ARRIVAL DATE AND DATE OF DEPARTURE, INCLUDING DEFINITE INFORMATION AS TO WHETHER SUCH ARRIVAL WILL BE IN THE MORNING OR EVENING.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

MAP SHOWS LOCATION OF PRINCIPAL HOTELS



HOTELS

Alexander Hamilton	27	Colonial	74	Glen Royal	66	Maryland	33
Ambassador	16	Commodore	88	Golden State	33	Maurice	6
Angelus	31	Court	78	Gotham	6	Mayflower	94
Arlington	29	Crane	43	Granada	65	New Olympic	23
Baldwin	71	Davenport	92	Harvard	19	Ormond	21
Bellevue	37	Drake-Wiltshire	63	Herald	22	Oxford	17
Brayton	15	El Cortez	49	Herbert's	32	Padre	12
Broadmoor	91	Embassy	8	Keystone	26	Paisley	95
Californian	38	Empire	5	King George	40	Palace	58
Canterbury	67	Fairmont	77	Lafayette	10	Pickwick	96
Carlton	57	Federal	4	Lankershim	18	Plaza	82
Cartwright	69	Fielding	53	La Salle	9	Powell	25
Cecil	51	Franciscan	54	Leland	73	President	97
Chancellor	90	Gartland	35	Lombard	34	Ritz	24
Clark	14	Gaylord	47	Manx	44	Roosevelt	13
Clift	39	Geary	93	Mark Hopkins	78	St. Francis	55
				Mark Twain	29	San Carlos	36

Senate	50	Whitcomb	7
Senator	48	Worth	20
Shaw	94	Yuba	3
Sir Francis Drake	21		
Somerton	17		
Stewart	52		
Stratford	12		
Sutter	95		
Terminal	58		
Vanderbilt	96		
Victoria	82		
Virginia	25		
Von Dorn	97		
Washington	24		
West'n Women's Club	13		

MEETING PLACES

War Memorial—Veterans Building	42	A
War Memorial—Opera House	45	B
High School of Commerce	84	C
City Hall	78	D
Health Center Building	30	E
State Building	75	F
Exposition Auditorium	41	G
Fox Theatre	11	H
Library	72	I

APARTMENTS

Pearsonia Apts.	79
Louard Apartments	80
Plaza Apartments	81
Congress Apartments	82
316 Fulton Street	83
Steinhart Apartments	84
Georgian Court Apts.	85
St. Francis Apartments	86
805 Bush Street	87
Kenilworth Apartments	88
540 Stockton	89
Court Apartments	90

Report of Committee on Labor, Employment and Social Security

(*Continued from page* 127)

ments proposed in this report as to the National Act.

Dated, January 6, 1939.

Respectfully submitted,

WILLIAM L. RANSOM, Chairman
HENRY EPSTEIN
HEDLEY V. RICHARDSON
CLIF. LANGSDALE*
HERMAN L. EKERN**

*Submits a separate statement, disagreeing in part as to the National Labor Relations Act.

**Submits a separate statement, disagreeing in part.

*Summary of Separate Statement by Mr. Clif. Langsdale—Disagreeing in Part as to National Labor Relations Act

To some of the language that is used in the preliminary report of the Standing Committee on Labor, Employment and Social Security, I do not give my approval. [After quoting from an article by Dr. John A. Lapp in the December issue of the *American Labor Legislation Review,* Mr. Langsdale continued:]

Prior to the passage of the National Labor Relations Act, it was not against the law for an employer to indulge in any of the conduct that is now made unlawful as unfair labor practices. It was and still is unlawful for employees to engage in conduct which can be characterized as "interfering with or coercing other employees in choosing whether they will belong to a union or no union." Such conduct is prohibited by criminal laws of municipalities and States, and has long been the subject of petitions for injunction. Courts of equity, both Federal and State, still prohibit such conduct by injunction, and properly so, despite the Norris-LaGuardia Act and similar State Acts. To put a further prohibition upon such conduct by employees by amendment to the National Labor Relations Act would be merely to create a situation to raise irrelevant issues in a hearing designed only for the purpose of securing the workers the right to bargain collectively and without coercion or intimidation by their employers.

I cannot conceive that the National Labor Relations Board is a partisan agency because it enforces the National Labor Relations Act any more than is a District Judge of the United States who enforces the Criminal Code.

The first proposed amendment of the National Labor Relations Act, discussed in the preliminary report, is as follows:

"1. *Should the Act be amended so as specifically to give to employers the right to petition for an employees' election to choose their collective bargaining representative, in situations where no 'company union' is found by the Board to be involved?*"

I am in favor of such an amendment.

It is further suggested:

"2. *Should the Act be amended now so as to define and forbid as unfair certain specific and clearly defined practices by labor organizations and groups of workers, including both practices directed against employers and against free choice by individual workers?*"

I am unalterably opposed to such an amendment. I believe that any amendment of that character would be viewed by lawyers as an attempt to distort the true issues and to destroy the effectiveness of the Act.

As I have already pointed out, coercion and intimidation on the part of employees are already prohibited by law. It is unnecessary to incorporate a further prohibition in the National Labor Relations Act. * * *

I believe that "sit-down" or "stay-in" strikes are illegal. I agree with everything that the preliminary report says about them. In addition to that condemnation, I believe that they have done more harm to the labor movement in America than all other agencies combined, in that they have aroused a large percentage of public opinion against all labor union activities. But I am doubtful of the advisability of the necessity of amending the National Labor Relations Act to prohibit such strikes. I am afraid that such an amendment could be used to cripple the effectiveness of the real purpose of the Act. I would not be in favor of going any further than to prohibit the Board from taking cognizance of any complaint of workers or a union *while* the "sit-down" or "stay-in" strike is in progress.

It is further suggested in the preliminary report:

"3. *Should the Act be now amended so as to provide that after an election or a certification of a majority bargaining agency, no minority strike, picketing, or boycott should be tolerated; and any labor organization resorting to such weapons should be denied standing or recognition for a definite period in that plant or industry, under the Act?*"

I believe that an amendment which would go no farther than to deny a labor organization standing under the Act for such conduct would be helpful and fair. But I would not be in favor of curbing the right of a minority to strike or picket or boycott any more than I would be in favor of denying to a labor union with no employees in a plant the right to picket or boycott that plant. * * *

The preliminary report further asks:

"4. *Should the Act be now amended so that the decision and findings, particularly the conclusory findings, of the Board shall be made judicially reviewable on the law and the facts?*"

Such an amendment would in my opinion completely destroy the effectiveness of the administration of the Act. * * * I believe that the opinion of the Supreme Court in the *Consolidated Edison* case, quoted in the preliminary report, takes care of the real contention of the proponents of such an amendment. [Quoting from the opinion.] * * *

CLIF. LANGSDALE

**Summary of Separate Statement by Mr. Herman L. Ekern—Disagreeing in Part

The National Labor Relations Act is a specific legislative recognition of the right of collective bargaining by employees through representatives of their own choosing. The Act extends to employees a protection in dealing with employers for which labor has been contending over a long period of years.

The Act is designed solely to enforce this right. It does so by penalizing the employer for interfering with self-organization or refusing to bargain. Amendments which do not serve this purpose have no place in this Act. Changes should only be attempted as administrative and judicial interpretations develop the nature and need of specific amendments to carry out its basic purpose.

The Act appears to vest the Board with discretion as to what action, if any, it will take in a controversy in reference to an election, and any amendment should preserve this discretion as to an employer petition at least to the extent provided in the New York law.

Provisions prescribing prohibited practices by labor organizations and employees or to deny standing under the Act to a minority organization for engaging in a strike or other cause are not amendments designed to carry out the basic purposes of the Act. This applies equally to any similar amendment.

The sit-down strike is an unlawful deprivation of property to be condemned and dealt with through appropriate legal remedies aided by developing a public sentiment that insists upon respect for the law. I believe that the main report errs in stating that the Fair Labor Standards Act departs from the traditional bargaining policy of the craft unions. These unions have long favored fixing general minimum wages and maximum hours, but only to the extent recognized as a social and economic policy involving no change from the policy of collective bargaining. * * *

The suggestion in the discussion under the Social Security Act, that there is but one basic problem—the provision for those in need—is one with which I cannot agree. * * *

It seems to me that the real basic problem is the development of a sense of responsibility on the part of the individual, with the strongest assurance that government can give that a minimum measure of his savings will be protected and available to him on a self-respecting basis without proof of poverty when the benefits are payable.

Subject to the foregoing, I am generally in accord with the main report.

HERMAN L. EKERN

[Appendices to Part III of the report are the full texts of the Initiative Ordinance adopted by vote of the citizens of Los Angeles on September 16, 1938, and the Initiative Act adopted by vote of the people of the State of Oregon on November 8, 1938.]

Delegates—Fourth Session

(*Continued from page* 111)

of Rights, Mr. Grenville Clark, had stated to him and to the House on Monday evening that the Committee had upon its own initiative filed a brief in the Jersey City. case. Mr. Clark replied: "I think I recall quite vividly the question and answer. The question was, will the gentleman say by what authority the action was taken to prepare and file the brief in the Hague case, and at whose suggestion was that action taken? I think I recall the answer, which was that, with regard to the question of authority, the action was taken pursuant to authority contained in the resolution creating the Committee; that is all. There was no statement that the action was taken without the authority, full authority, of the President of the Association, which was a part of the resolution, a part of the approval required. I did not state that we lacked authority from the President, and I now state that we had the authority of the President throughout.

"With regard to the second question, I replied. I admit, rather sharply because what did the question mean? It meant in effect, for whom were you acting as puppets? I thought the question invidious. I stated the fact when I said that the action was taken solely on the initiative of the Committee and without any suggestion from anyone whatever."

Guy R. Crump, of California, and later Chairman Gay of the House, stated that in justice to Mr. Vallance, it should be said that Mr. Vallance consulted the Chairman of the House and the Chairman of the Committee on Rules and Calendar as to the resolutions which had been adopted by the Council of his Section at its meeting in Chicago, and that Mr. Vallance had been "advised that the only method which could be used at all to bring those resolutions before the House would be by submitting them to the Committee on Dratt, which was done." Chairman Gay added that, "Of course, the Chair expressed no opinion as to what the House would do when they came before it for consideration."

For the Board of Governors, Secretary Knight moved the approval of a recommendation of the committee on Professional Ethics and Grievances on the subject of solicitation of divorce business, which was accompanied by a draft of a bill of which that Committee asked that it be allowed to seek the introduction and enactment by the Congress. The bill recommended by the Committee was as follows:

"A BILL to prohibit the use of the mails for the solicitation of divorce business.

"Be It Enacted by the Senate and House of Representatives of the United States in Congress assembled, that a new section, number 341½ is hereby added to Title 18, Part 1, Chapter 8 of the Code of Laws of the United States of America, reading as follows:

"Sec. 341½. No letter, postal card, circular, newspaper, pamphlet or publication of any kind containing any advertisement or notice of any kind offering to procure or obtain, or to aid in procuring or obtaining any divorce, or the severance, dissolution, or annulment of any marriage, or offering to engage or appear or act as attorney, counsel, or referee in any suit for alimony, or divorce, or the severance, dissolution, or annulment of any marriage, shall be deposited in or carried by the mails of the United States, or be delivered by any postmaster or letter carrier, when addressed or directed to any person, firm, corporation, or association, or other addressee, at any place or point in any State or Territory of the United States, or the District of Columbia. Any person who shall knowingly violate any of the provisions of this section, shall be fined not more than $1,000 or imprisoned not more than six months, or both; and for any subsequent offense shall be fined not more than $1,000 or imprisoned not more than one year, or both.*

The recommendation of the Board of Governors, that the bill and the request of the Committee on Professional Ethics and Grievences be approved was adopted by the House of Delegates.

On motion of Harold Gallagher of New York, the report of the Treasurer was dispensed with until the San Francisco meeting.

Former-President Clarence E. Martin of West Virginia rose to move the reconsideration of the adoption of the report of the special Committee on Administration Law, so far as Section 4 and its provisions for judicial review were concerned. The following took place:

"MR. LAWTHER: I would like to ask Mr. Martin how he voted. If he didn't vote in the affirmative, he can't move reconsideration. You voted against it."

"MR. MARTIN: I am afraid you are right."

"CHAIRMAN GAY: The Chair rules Mr. Martin's motion out of order."

"MR. MARTIN: That is right, sir, without the permission of the House."

There being no other business to come before the House, a motion by Mr. Teiser of Oregon to adjourn was carried. at 12:35 P. M.; and the delegates joined in mutual expressions of pleasure in the success of the meeting and the thoroughness with which the deliberative processes of the House had moved to well-considered decisions.

*Note: The foregoing draft is similar in form to Section 341, U. S. C., title 18, forbidding the use of the mails for advertisements of intoxicating liquors in prohibition states. The substance is taken from Section 159a of the California Penal Code, which prohibits advertising to procure divorces, etc.

LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

The Relation Between the Board of Governors of An Integrated Bar and the Supreme Court

IT IS generally agreed that a statute setting up an integrated or incorporated bar is unconstitutional if it purports to confer upon the organization it creates the power to act with finality. In re Gibson, 35 N. M. 550, 4 P. 2d 643; In re Edwards, 45 Idaho 676, 266 P. 664; State Bar of Calif. vs. Superior Court of Los Angeles County, 207 Cal. 323, 278 P. 432. See also 18 Cal. L. Rev. 50; 15 Minn. L. Rev. 814. In consequence it has become well settled that the recommendations of a Board of Governors may be disregarded by the Supreme Court of the State. An attorney may be admitted by the Court when the Board recommends against it. Brydonjack v. State Bar of California, 208 Cal. 439, 281 P. 1018, 66 A. L. R. 1507. Likewise the Court may refuse to impose any discipline when the Board recommends it or impose less discipline than is recommended. That there is sometimes a case in which the recommendation of the Board is unjust or unwise would not be denied, but, unless there is reason to believe that the Board did not act in good faith or were influenced by prejudice it would seem that its findings of fact should be accepted by the Supreme Court and its recommendations adopted also.

In a recent case in Washington, In re Lillions, 82 P. (2d) 571, an attorney had been convicted of embezzlement, sentenced to confinement in the state penitentiary, but his sentence was suspended. Later charges were filed against the attorney, the board of law examiners recommended his disbarment and the Supreme Court disbarred him. Still later an application for reinstatement was denied. About four years after disbarment another application for reinstatement was made. The Board of Governors investigated the matter and unanimously adopted a resolution denying the application. The proceedings before the Board were certified to the Supreme Court. The petitioner was reinstated. Three judges dissented, saying:

"In dissenting from the foregoing order, I do not feel at liberty to discuss the merits of the matter. Since the order reinstates the petitioner to all of his former rights and privileges as a member of the bar, all debate and discussion concerning his past delinquency should now be considered foreclosed, lest something might be said which would tend to handicap the petitioner in his effort to rebuild and restore his professional life. These considerations, however, do not preclude an inquiry as to the wisdom and propriety of entering the order over the protest and against the unanimous recommendation of the Board of Governors of the State Bar Association.

"For many years there has been no more insistent and persistent public demand than that the bar take effective action to discipline its unworthy members. The bar of this state has made a sincere effort to comply with that demand. To set up effective disciplinary machinery was not only the major reason for the creation of the integrated bar, but the successful accomplishment of that purpose has also proved to be the principal justification for its continued corporate existence.

"The fact that each member of the Board of Governors is chosen from a different Congressional district would seem to be a sufficient check against the operation of local personal prejudice in dealing with matters of discipline. There is no reason to suppose that the members of the Board of Governors are any less merciful or any less just minded than the members of this court. They are, obviously, in a vastly better position to know the facts concerning such matters and the public reaction to them than we can possibly be, since they are each and all engaged in the active practice of the law and, therefore, continuously dealing with, and mingling with, the public, while we have been semi-cloistered for varying periods of from one to twenty-six years.

"The problem of maintaining discipline among the members of the bar is, in many respects, not unlike the problem of maintaining discipline in the public schools. Long experience in that field has repeatedly demonstrated that no effective discipline can be maintained in any public school unless the disciplinary acts of its principals and teachers are customarily sustained and approved by the final authority, the Board of Education.

"In my opinion, the unanimous recommendation of the Board of Governors, as regards disciplinary matters, should not be disregarded, except in very exceptional cases. I can see no reason for not according to the unanimous determination of the board at least as great a presumption of verity and finality as we are accustomed to accord to the findings and determination of a superior court in the ordinary case which comes before us for review. That presumption, I think, was not accorded to the recommendation of the Board of Governors in the instant case."

More Effective Character Tests for Law Students Urged

In his report upon the second year of his work as Proctor of the Bar of the Eighth Judicial District of New York, Mr. Karl A. McCormick declared that if the same importance had been attached to character tests that have been given to educational requirements during the last twenty years the bar would stand much higher in public esteem than it does today. He emphasized the necessity of an improved system for sifting out the morally unfit before or shortly after they begin the study of law. He sees hope in the recent organization by the National Conference of Bar Examiners of a committee that will seek to formulate uniform and effective methods of preventing the unfit from going far into their law studies if the bar of the country gives its attention to the matter and cooperates with the committee.

The problem of weeding out the unfit, in his opinion, is closely related to the problem of relieving the overcrowded condition of the bar. The report points out in this connection that in the business world surpluses of any kind tend to be corrected through the operation of economic laws, but in a confidential profession surpluses of service do not correct themselves automatically and can only tend to create great hardships and unsatisfactory results in many instances.

Rather than in an advantage to the customer, as would be the case where there was a surplus of goods, a surplus of lawyers results in a disadvantage to the public. "Many people who practically fix their attorney's charges fail to realize that they may not receive the best service they can obtain, because their attorney has been forced to accept a bad bargain," the report said.

Holding that if there were many less lawyers there would be a great many less opportunities for criticism on the part of the public, the report asserts that the only point at which a highly unsatisfactory condition can be corrected is where the student seeks to enter law school.

The report states that character tests at present in a great majority of States mean little more than a pres-

entation of letters or certificates and a rather cursory examination by the local committee.

In his own district Mr. McCormick has found among the applicants for admission men with criminal records, others upon whom he reported unfavorably but whom the committee passed because it seemed unfair to prevent their admission after graduation from law school, and others whom he regarded as totally unfit but as to whom he had no tangible evidence of wrongdoing. "But I am sure," he stated, "that there will be complaints against these persons before they have been in practice many years."

In the last class of twenty admitted, Mr. McCormick says, there were at least six who would never have been in the class had they been subjected to the preceptor system in use in Pennsylvania.

Admitting there may be no perfect system, he maintains that this is no argument against seeking to improve on what we have now. If it is true, he says, that no fair test of character can be made until after a man has been in actual practice for some time, then there is no point in having character examinations at all. Actually, the student should be under a character test throughout his law studies and should know that this is of more importance to him than his formal legal education or his bar examination, the report maintains.

"The great importance of being able to assure the public that the men who receive a lawyer's license are all, actually, as well as theoretically, 'of good moral character,' demands that every effort be made to bring this about."

Cleveland Bar Association to Oppose Judges Who Become Candidate for Non-Judicial Office

President James C. Logue, of the Cleveland Bar Association, recently announced the Executive Committee's passage of a resolution to discourage judges from becoming candidates for non-judicial office.

In recent years, three judges of the Supreme Court of Ohio have sought election to the United States Senate without resigning from the Court. Since each of them was defeated, the applicability of the constitutional provision, that all votes for such judges "for any elective office except a judicial office under the authority of this state given by the general assembly or the people of the state shall be void," became a moot question.

The resolution passed was as follows:

"WHEREAS, Article 4, Section 14 of the Constitution of the State of Ohio, among other things, provides: 'All votes for either of them (meaning a judge of the Supreme Court and of the Court of Common Pleas) for an elective office except a judicial office under the authority of this state given by the General Assembly or the people of the state, shall be void' and,

"WHEREAS, several judges of Ohio courts have, in recent years, been candidates for non-judicial office while continuing to perform the duties of their judicial offices, now,

"BE IT RESOLVED by the Executive Committee of the Cleveland Bar Association as follows, to-wit:

"1. That no judge of an Ohio Court of record should continue to hold his office while a candidate for the nomination or election to a non-judicial office and that such practice is hereby condemned.

"2. That if a judge of an Ohio Court of record should decide to become a candidate for any office not judicial he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.

"3. That if a judge of an Ohio Court should, in the future, become a candidate for a non-judicial office contrary to the provisions of Article 4 Section 14 of the

Constitution of the State of Ohio, the Association shall immediately take the necessary steps to have declared void all votes that may be cast for such judge who is a candidate for a non-judicial office."

A former Attorney-General of Ohio has ruled that a congressional office is a state office within the meaning of the constitutional provision quoted above.

Supplementing Article on "Federal Administrative Agencies"

EDITOR AMERICAN BAR ASSOCIATION JOURNAL:

Supplemeting my article in the January number on "How to Locate Regulations, etc. of Federal Administrative Agencies," will you kindly allow me space for the following useful information, which came to my attention only after the JOURNAL had gone to press:

Note *a*, par. (5) 1: "Prentice-Hall, Inc. has several specific services, mentioned at the appropriate places in the following notes."

Par. 3, subpar. (a), *Banking and Public Finance,* Note 9, *Federal Reserve Administration.* "Prentice-Hall, Inc. furnishes a Federal Bank Service (two volumes), which contains all of the regulations of the Board of Governors of the Federal Reserve System, and digests or full texts of the Board's administrative rulings."

Par. 3, *Banking and Public Finance,* (b) *Federal Deposit Insurance Corporation.* Note 9*a*: "The Prentice-Hall Federal Bank Service contains all of the regulations of the Federal Deposit Insurance Corporation, and reports all rulings, decisions, and opinions concerning the operation of the Corporation."

Par. 4, *Civil Pensions,* (a), *Old Age Benefits and Unemployment Insurance,* Note 10: "Prentice-Hall, Inc. furnished an Unemployment Insurance Service (four volumes), on the Federal Social Security Act, including Federal old age benefits, and State Unemployment Insurance Laws, containing the laws in full text, with all decisions, rulings, regulations, instructions, and forms thereunder."

Par. 4, *Civil Pensions,* (b), *Railroad Retirement Board,* Note 11: "The Prentice-Hall, Inc. Unemployment Insurance Service contains the regulations of the Board."

Par. 10, *Housing,* Note *22*: "The Prentice-Hall Federal Bank Service contains the regulations of the Federal Housing Administration, the Home Owners' Loan Corporation, Farm Credit Association, Home Loan Bank Board. the Federal Savings and Loan Association and the Federal Savings and Loan Insurance Corporation, with statutes, decisions, opinions, and rulings."

Par. 14, *Internal Revenue,* (a) Note 31: "The Prentice-Hall Federal Tax Service (four volumes) covers Federal tax practice in the Bureau of Internal Revenue and under the Board of Tax Appeals, and contains all pertinent laws, regulations, rulings, and decisions, also publishes a Citator showing a complete history of all such decisions."

Par. 15, *Labor Relations,* (a) Note 36: "The Prentice-Hall Labor Service (one volume), contains the full texts of the National Labor Relations Act, the Federal Anti-Injunction Act, and other important Federal laws, the Court decisions, the Regulations of the National Labor Relations Board, of the various State Labor Boards, and of the Department of Labor under the Public Contracts Act."

"In the Department of Labor there is also a Division of *Public Contracts* (U. S. Code, tit. 41, §§35-45), supervising the requirement that in contracts with a government agency there shall be a stipulation for paying the 'prevailing minimum wages' for labor. This Board holds hearings and makes recommendations to the Secretary of Labor, but no regulations of procedure appear to have been yet issued."

Par. 15, *Labor Relations,* (c), the Fair Labor Standards Act, Note 37: "The Prentice-Hall Labor Service includes all of the regulations, rules, and bulletins of the Wage and Hour Division."

Par. 20, *Public Health,* Note 48: "Prentice-Hall, Inc. has a Federal Food, Drug, and Cosmetic Service which contains all of the rules and regulations promulgated under the new Food, Drug, and Cosmetic Act and other acts enforced by the Food and Drug Administration."

Par. 22, *Reconstruction Loans,* Note 52: "The Prentice-Hall Federal Bank Service contains all of the Circulars of the Reconstruction Finance Corporation and the text of all applicable laws."

Par. 23, *Securities,* Note 55: "The Prentice-Hall Securities Regulations Service contains the rules of practice and all of the regulations and forms issued pursuant to the three Acts above mentioned, with decisions and opinions relating to all of them."

Par. 25, *Trade,* Note 58: "Prentice-Hall, Inc. has a Trade Industry Service, reporting all of the Federal trade statutes, regulations, judicial decisions, commission rulings, and administrative orders, with digests and indices."

JOHN H. WIGMORE.

Chicago, Jan. 25, 1939.

Washington Letter

Mr. Justice Frankfurter

THE confirmation, by the Senate without a dissenting voice, of Professor Felix Frankfurter, of the Harvard University Law School, to be an Associate Justice of the United States Supreme Court was a tribute to his eminent qualifications for the position.

Upon graduation from law school in 1906 Mr. Frankfurter was assistant to the United States Attorney, Southern District of New York, for approximately five years. Thereafter, he was made law officer of the Bureau of Insular Affairs in Washington; and, during the World War, was special assistant to the Secretary of War, where he directed the Government's labor policies in the war materials industries. Since the War he has been teaching law at Harvard, having become head of the department of administrative law in 1924.

The marriage ceremony between Marion A. Denman and Felix Frankfurter was performed in 1919 by the late Justice Cardozo whom he now has succeeded. The Frankfurters have no children. Among his close personal friends were Justices Holmes and Cardozo, as is also Justice Brandies. Justice Frankfurter has been a member of the American Bar Association since 1911. Of the considerable number of his writings, the best known is "The Business of the Supreme Court," done with James M. Landis in 1928. Some of his political tenets and a look into his constitutional philosophy are indicated by these things which he is quoted as having said:

"Democracy is the only way, rough as that may be, to a civilization that adequately respects and thereby helps to unfold the richness of human diversity."

"The judges of the Supreme Court are in fact arbiters of social policy. They are so because their duties make them so. . .

"The Constitution has ample means within itself to meet the changing needs of successive generations, for it was made for an undefined and expanding future, and for a people gathered from many nations and of many tongues.

"If the court, aided by an alert and public-spirited bar, has access to the facts and follows them, the Constitution is flexible enough to meet all the new needs of our society."

When Mr. Justice Frankfurter notes the flexibility of the Constitution and the means within it for meeting changing needs, there is not apparent any reason for believing that he has overlooked Article V which defines the process of amendment.

In Vienna, Austria, November 15, 1882, Felix Frankfurter was born, the son of Leopold Frankfurter and Emma Winter Frankfurter. It is said that when he entered this country as an immigrant at the age of twelve he could not speak English. Twelve years later he graduated from Harvard Law School with highest honors, having previously completed the public school work and obtained an A. B. degree from the College of the City of New York.

Are Lawyers Persons?

An issue raised under the new Rules of Civil Procedure in the District Court of the United States for the District of Columbia before Justice Jennings Bailey may throw light on the question stated. Rule 26(a) provides for the taking of the testimony of "any person," whether a party or not, for the purpose of discovery. Then, subdivision (b) says that the deponent may be examined regarding any relevant matter "not privileged."

In a pending local case, Rowe v. Union Central Life Insurance Company, plaintiff's attorney sought, by deposition, to obtain from defendant's attorney the names of prospective witnesses, that is, of persons having knowledge of relevant facts. He contends that the expression, "any person," rules out an effective claim of

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HON. FELIX FRANKFURTER
Associate Justice of the Supreme Court of the United States

privilege in respect to the mere names of prospective witnesses, as distinguished from the facts as to which they might testify. The attorney for the insurance company appeared but refused to be sworn and declined to furnish the names requested on the ground that he obtained such information through communications with his client and therefore it was privileged.

Justice Bailey asked counsel for briefs in support of their positions and, at the time of this writing, those briefs are due shortly. Both counsel say they do not have a decision exactly in point; and, so far as ascertainable here, the question under the present rules seems to be a new one. They each are interested in obtaining the Court's ruling for the benefit of future procedure.

Attorney General Frank Murphy

Appointment of Frank Murphy, former Governor of Michigan, to be Attorney General was approved by the Senate January 17th. He was born April 13, 1893 at Harbor Beach, Michigan. His parents were John F. Murphy and Mary Brenman Murphy. His legal education began at the University of Michigan where he obtained his LL. B. degree in 1914. Afterward he engaged in graduate study at Lincoln's Inn, London, and at Trinity College, Dublin, Ireland.

Mr. Murphy was in the practice of law at Detroit in 1916 and 1917; was chief assistant to the United States District Attorney for the Eastern District of Michigan from 1920 to 1923; was instructor in law at the University of Detroit from 1922 to 1927; and was judge of the Recorders Court, at Detroit, from 1923 to 1930. He was elected mayor of Detroit and served from 1930 to 1933 when he resigned to accept the presidential appointment of Governor-General of the Philippine Islands, whence he returned to run for Governor of Michigan, to which office he was elected in 1936.

Although the sub-committee of the Senate had voted unanimously to confirm him without the necessity of a hearing, Attorney General Murphy felt that, inasmuch as he had been frequently charged with condoning "sit-down strikes," in the public interest he should make a statement concerning his part in the settlement of industrial disputes in Michigan in 1937. Here it is in full, with the exception of certain exhibits which he read:

"It is, I know unusual for a nominee for high office to ask to raise an issue before a Senate sub-committee sitting to judge his fitness for office, after that sub-committee has approved his nomination.

"There has been much public discussion concerning my conduct as Governor of Michigan during sit-down strikes in Flint and other Michigan cities in the winter of 1937.

"Since that issue has not been raised and discussed before the sub-committee by anyone else I have asked your permission to raise it myself.

"With the sub-committee's permission, I should like first to read this prepared statement explaining briefly the labor situation in Michigan which confronted me when I became Governor and what I did to meet it. I believe that such preliminary explanation on my part would save the time of the Committee by making it possible for me to answer more clearly and concisely any questions which any members of the Committee may thereafter wish to ask.

"I took office on January 1, 1937. The General Motors strike was already on. It had begun at Flint two days before, on December 30.

"The General Motors strike which greeted me in office was not an isolated phenomenon. I inherited a general atmosphere of tense labor unrest. During 1936, there had been a number of other important strikes—some of them sit-down—in Michigan and elsewhere and to the best of my recollection force had not been used by the public authorities to cure the situations.

"Special conditions in Michigan made labor relations generally more difficult than anywhere else in the country.

"Michigan industry—in the great automobile factories and parts plants—is more highly organized on a machine basis than anywhere else, and until very lately irregularity in employment was sharper there than in other parts of the nation.

"The depression had probably hit industrial labor harder in Michigan than anywhere else; I know that when I was Mayor of Detroit the relief problem hit us much earlier than anywhere else.

"The speed of operations in the automobile industry requires that its workers be comparatively young men. They are well educated and very conscious of what they consider their rights as American citizens. They are high-spirited and not easy to discipline. When I took office, their union organizations were only a few months old, and the natural discipline problems of newly organized unions were accentuated by the fact that the employers had refused to recognize these unions.

"That points up to the most salient fact in the situation when I took office.

"There was no operating legal machinery for settling labor disputes; the Wagner Act was at that time practically out of operation under decisions of lower federal courts. As a Governor faced with the fact of unprecedented strikes which had to be handled I had to devise ways and means of handling them as I went along.

"Many employers—acting under advice of counsel—had refused to bargain collectively and had maintained that the Wagner Act was wholly unconstitutional, and a number of lower federal courts had upheld their contentions. This created a keen feeling on the part of labor that the workers were being deprived of the benefits of the duly enacted National Labor Relations Act. Labor was further embittered by the feeling that their efforts at self-organization were being frustrated by industrial espionage.

"In many industries, organized labor was something new; it was not recognized, but was bitterly fought by the employers; in turn it had not fully acquired a sense of its own responsibility and was not readily amenable to the discipline of its more seasoned leaders. Misguided, inexperienced, and undisciplined workers were doubtlessly fascinated by the novelty of the sit-down as a new industrial weapon and seized upon it as a method of self-defense and reprisal against what they in many instances believed justifiably or unjustifiably were lawless tactics upon the part of employers.

"Against this background thousands of otherwise peaceful, law-abiding, hard-working citizens went on strike in Flint, Detroit, and other cities. They had determined that their right to bargain collectively should be recognized. They were determined to occupy their employers' factories until their employers recognized their right to bargain collectively. They were not a handful of common criminals who might be dispersed by a few police. They were thousands of honest citizens.

"Of course they were guilty of violating the law. Their conduct was unlawful and unjustified. But in their own minds they believed that they were only defending their own rights against what they believed to be the lawless refusal of their employers to recognize their unions.

"In that situation, with no recognized machinery to settle the dispute, I faced a condition and not a theory.

"As the Chief Executive of the State of Michigan it was my duty to see that the laws were faithfully executed. But I conceived it to be my duty as Governor to see that the laws are executed in the manner best calculated in my judgment to serve the original and the ultimate purpose of all laws—to preserve public order and insure public safety. To have executed the laws in a manner calculated to cause further breach thereof, further disorders, and even riot and bloodshed, would have

been false to my own oath of office and to the law.

"In the first instance, of course, law enforcement is a matter for the local authorities. If they require aid in addition to the regular police force, they may call upon the Governor for assistance or themselves swear in additional deputies.

"Whenever the local authorities did call upon me for aid, not only were they authorized and directed to swear in additional deputies, but in many cases members of the State police were sent to aid them, and in one case a large detachment of the National Guard.

"In only one case was I called upon by local authorities for assistance in the enforcement of a court writ. That was at Flint.

"There the technical legal situation was badly complicated from the practical emotional viewpoint by the fact that counsel for General Motors obtained their first court order from a judge who was discovered to be a substantial stockholder of the company.

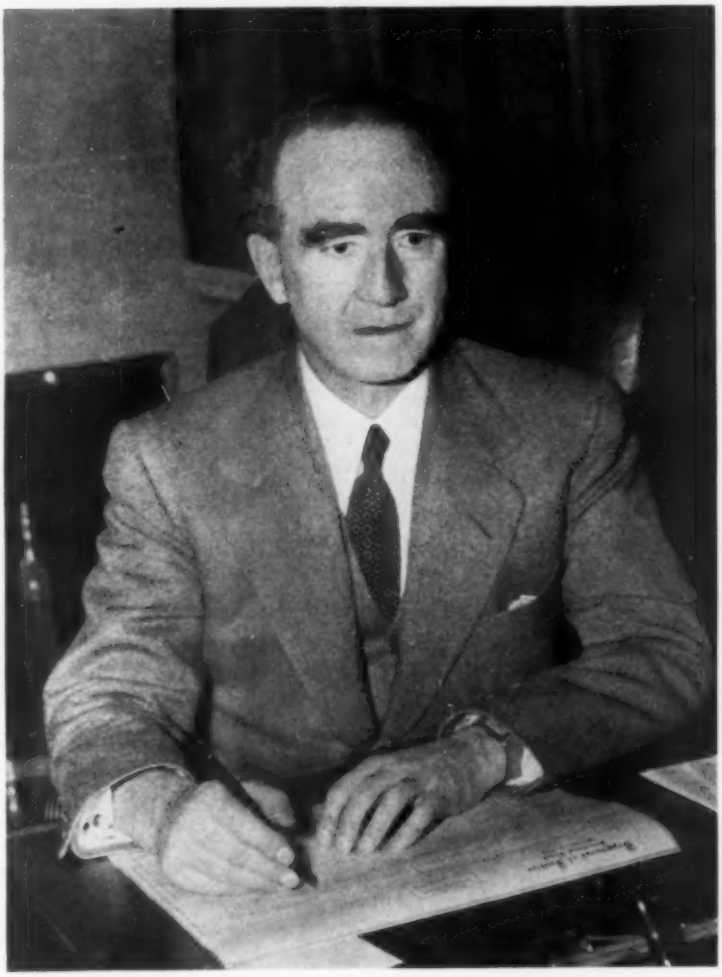
"When this fact was disclosed the company promptly withdrew its application before that judge and sought its relief from another, and I am convinced that the company officials had no prior knowledge of the disqualifying interest of the first judge. But however innocent the mistake, it was difficult to eradicate the impression from the minds of the workers that the company had tried to secure a court order from a judge who was not disinterested.

"When the writ of attachment was finally obtained, on a Friday, negotiations between the company's officials and the union representatives were progressing, and I had reason to believe that a settlement would be reached over the week-end.

"I did not ignore the writ of attachment. On the contrary, I warned the union representatives that I would enforce it. But I knew, as did the union representatives, and the company's officials, that the literal enforcement of the writ at that moment would not only disrupt negotiations, but could not be carried out without the gravest risk of property damage, riot, and even bloodshed which would leave bitterness and ill-feeling between the company and the men for years to come.

"I realized that on the law of averages troops could not be turned loose in such a situation without taking the lives of some misguided, ordinarily peaceful citizens.

"Having been a captain in the World War, I could not look upon young men of the age of these strikers against whom these troops would be sent and forget that there might come a time when we might be asking them to be troops themselves.



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HON. FRANK MURPHY
Attorney-General of the United States

"Consequently, when the sheriff asked for additional deputies to help execute the writ, I told him that I thought he would be wiser to delay action over the week-end, as settlement appeared to be imminent.

"On the one side the company knew of my action and did not protest.

"On the other side the union representatives knew that if a settlement was not reached and the plants peacefully evacuated, the writ would be executed.

"And at the plants I had a large detachment of the National Guard continuously on duty prepared to preserve order and ready for any emergency.

"I believe that I did my duty to 'see that the laws are faithfully executed' and to preserve the peace and dignity of the State of Michigan.

"I believe that 'faithful execution' by the governor of a State includes wise administration of the law and not merely its literal instantaneous application at any cost.

"I conceived it my duty as Governor of the State not only to see that the writs of the courts were executed but also to see that peace and order were maintained.

"I conceived it to be my duty as the Governor of the State not only to see that the law was enforced after it was broken but to see that the law was observed before it was broken.

"To safeguard not only the enforcement of the law but its observance, I conceived it my duty to exert every effort to replace industrial strife and unrest which would wreck the economy of my State with industrial peace and order which would preserve the economy of my State.

"I have never condoned the sit-down strike or countenanced disobedience of a court order. From the very begin-

(*Continued on page* 174)

News of the Bar Associations

Maine State Bar Association Holds Regular Biennial Meeting in Augusta—Hon. Bainbridge Colby Delivers Address on "The Lima Conference and the Monroe Doctrine"—Good Financial Condition of Association Reported—Offices Elected, Etc.

THE regular biennial meeting of the Maine State Bar Association was held at Augusta, Maine on Wednesday, January 11.

The forenoon session was held in the Judiciary Committee Room at the State Capitol, President Carroll N. Perkins of Waterville, Maine, presiding. The report of the Secretary covered only the period elapsed since the publication of the report of the last regular meeting and was largely statistical. Twenty-one members of the Association have died since Jan. 1, 1937 and three have resigned. The net membership on Jan. 1, 1939 was three hundred and seventy three, representing approximately fifty-one percent of the practicing attorneys of the State.

The report of the Treasurer showed the Association in good financial condition. The general business of this session was for the most part of a routine nature and hardly merits further record.

The feature of the afternoon session which was held in the Senate Chamber in the State Capitol, was an address by Hon. Bainbridge Colby of the New York Bar, one time Secretary of State in the Cabinet of President Wilson, on the timely subject "Lima Conference and the Monroe Doctrine."

Following the address, the Committee on Membership reported and thirty new members were accepted. New officers for the ensuing two years were elected as follows:

President, Harold H. Murchie of Calais; Vice Presidents—Louis C. Stearns of Bangor, Walter L. Gray of South Paris, and Charles E. Gurney of Portland; Executive Committee—Harold H. Murchie, *Ex officio*, James L. Perkins of Boothbay Harbor, Currier C. Holman of Farmington and Edward W. Atwood of Portland; Committee on Legislation—Edward F. Merrill of Skowhegan, Alan L. Bird of Rockland, Nathaniel Thompkins of Houlton, Donald S. Philbrick of South Portland and John Mahon of Lewis. Frank H. Haskell of Portland was re-elected Representative in the House of Delegates of the American Bar Association. Ralph W. Leighton of Augusta was re-elected Secretary and Treasurer.

Reports were accepted from Committee on Memorials to Deceased Members; Committee on Unauthorized Practice of Law; Committee on Legislation and from Frank H. Haskell, Member of House of Delegates.

Retiring President Perkins in his valedictory address made some pertinent and worthwhile suggestions as to future activities of the Association which met with the spontaneous approval of the large number of members present.

At the Augusta House in the Capital City, the members gathered at 7:30 P. M. for the Association dinner. One hundred and forty-eight were seated at the tables, retiring President Carroll N. Perkins acting as Toastmaster. The afterdinner speakers were His Excellency Lewis O. Barrows, Governor of Maine, Hon. Bainbridge Colby of New York, Justice James H. Hudson of the Supreme Court of Maine, Justice Arthur Chapman of the Superior Court of Maine, Judge Arthur W. Patterson, Judge of the Probate Court of Hancock County and Fred L. Scribner Jr. of the Cumberland County Bar.

RALPH W. LEIGHTON, Secretary

HON. HAROLD H. MURCHIE
President, Maine State Bar Association

Michigan State Bar Holds Third Annual Meeting—Legal Institutes on "Bankruptcy Procedure", "Insurance", "Probate Matters" and the "New Court Rules"—President Brand Speaks on "Three Years of Integration"

THE third annual meeting of the State Bar of Michigan was held in the Pantlind Hotel, Grand Rapids, Michigan, October 6, 7 and 8, 1938.

Thursday afternoon, October 6, two legal institutes were held, one of which consisted of discussions of the Chandler Bankruptcy Act. "Bankruptcy Procedure" was discussed by Hon. Paul H. King of Detroit, and "Corporate Reorganization" by Hon. Charles True Adams of Chicago. George S. Norcross of Grand Rapids presided at the meeting.

The legal institute on "Insurance" was presided over by Hon. Herbert P. Orr of Caro. A paper on "The Mortgage Clause in Fire Insurance Policies" was given by Henry C. Walters of Detroit. "The Waiver of Physician's Privilege and Other Waivers in Life Insurance Policies" was presented by Benjamin Kleinstiver of Jackson, and Maurice Miller of Detroit discussed "The Cooperation Clause in Automobile Insurance Policies."

On Thursday evening a dinner dance, arranged by the Grand Rapids Bar Association, was held in the Grill Room of the Pantlind Hotel.

The Friday sessions of the convention began with a local bar association breakfast at which Ralph T. Keeling of Pontiac presided. Mr. Keeling is Chairman of the State Bar of Michigan Committee on Local Bar Associations. A discussion of local bar problems was led by Mrs. Mary H. Zimmerman of Detroit, J. T. Hammond of Benton Harbor, Ben O. Shepherd of Detroit, Fred A. Mills of Kalamazoo and Kenneth W. Huggett of Hillsdale.

HON. CARL R. HENRY
President, State Bar of Michigan

At 10:00 o'clock Friday morning a legal institute concerning probate matters was held at which Charles S. Neithercut of Flint, Chairman of the Probate Committee of the State Bar, presided. C. Johnston Huddleston of Detroit discussed "The Attorney for the Executor or Administrator," and "The Sale of Real Estate in Probate Court" was discussed by Harry G. Gault of Flint.

At noon a luncheon was given honoring the Justices of the Michigan Supreme Court. George E. Brand of Detroit, President of the State Bar of Michigan, presided. Laurence W. Smith of Grand Rapids acted as toastmaster and Harold W. Bryant, President of the Grand Rapids Bar Association, extended a welcome to all in attendance at the convention in behalf of the attorneys of Grand Rapids. Chief Justice Howard Wiest spoke briefly and Hon. Carl V. Weygandt, Chief Justice of the Ohio Supreme Court, spoke on the subject "Judicial Administrative Problems."

At 2:00 o'clock Friday afternoon a legal institute on the new court rules was presented with Harold H. Smedley of Muskegon, Chairman of the State Bar Committee on Civil Procedure, presiding. "The New Michigan Supreme Court Rules" were discussed by Hon. Kelly S. Searl of St. Johns and a discussion of "The New Federal Court Rules" was engaged in by Thomas G. Long of Detroit and Harry Shulsky of Grand Rapids.

The State Bar annual banquet was held Friday evening with Hon. James H. Lynch of Pontiac presiding as toastmaster. Presidents of the local bar associations throughout the state were honored at the banquet and those in attendance were introduced individually to the assembly. A beautiful gold trophy, the gift of the Grand Rapids Bar Association, was presented by Harold W. Bryant to the Suburban Bar Association of Wayne County, which association registered the largest percentage of its membership in attendance at the convention. President George E. Brand spoke on the subject "Three Years of Integration" and Hon. David H. Elton, K.C. and Mayor of Lethbridge, Alberta, Canada, gave an address entitled "The Good Neighbor."

The closing session of the very successful third annual meeting was held Saturday morning, October 8, when the annual State Bar business meeting was conducted. Reports were given by the officers of the State Bar as well as by the chairmen of the various State Bar committees. An open forum was held and discussions were engaged in by the members.

An additional feature of the convention which proved to be very interesting was a tour of the famous Grand Rapids Furniture Museum personally conducted by R. A. Spencer, Curator, on Friday afternoon. This was followed by a tea, held at the Women's City Club, for the ladies attending the convention, given by the wives of Grand Rapids Bar Association members.

Oklahoma State Bar Holds Ninth Annual Meeting—Section Addresses of General Interest Delivered at Main Sessions—Judge Bratton Delivers Address—Full Rule-Making Power for Court Urged—New Members of Board of Governors

THE Ninth annual meeting of the State Bar of Oklahoma was held at Oklahoma City on December 29 and 30, 1938. Approximately 800 members of the State Bar were registered in attendance, making it the best attended convention in the history of the integrated Bar, and in fact of any meeting of the Bar ever held in the State of Oklahoma.

The meeting opened with the usual address of welcome and response, followed by President Frank M. Bailey's address. Following this was the very able address on "The New Bankruptcy Law" by Henry L. Fist of Tulsa, Chairman of the Commercial Section of the State Bar.

The first session closed with the address of the Hon. C. C. Brown, Chairman of the Oklahoma Tax Commission, on "The Relation of Taxation to the Mineral Industry." The remainder of the day, beginning at noon, on Thursday the 29th, was divided between the open forum conducted by Logan Stephenson, Chairman of the Committee on Local Bar Associations, and James D. Fellers, Chairman of the Junior Bar Conference of the American Bar Association and section meetings.

The sections of the State Bar conducted their annual meetings at the same time. These were as follows: Criminal Law and County Attorneys; Probate Law; Insurance Law; Taxation; Real Estate Law; Commercial Law and Practice; Corporation Law and Mineral Law.

American Bar Association Committeemen Present

The Mineral Law Section was especially favored by the presence of Mr. Stanley B. Houck of Minneapolis, Minnesota, Chairman of the American Bar Association's Section on Mineral Law, and Mr. James L. Shepherd of Houston, Texas, Secretary of that Section, both of whom delivered well received addresses on the work of the American Bar Association in connection with Mineral Law.

The Section on Commercial Law and Practice was addressed by Mr. F. B. H. Spellman, Member of the Special Committee of the American Bar Association on Law Lists, who detailed the work and progress of that committee on the question of law lists, so vital to the commercial law and practice.

Judge Bratton Speaks

The second general session of the meeting was held Thursday evening, December 29th, with President Frank M. Bailey presiding at the annual banquet. This was followed by the principal address of the meeting, by the Hon. Sam G. Bratton, Judge of the United States Circuit Court of Appeals of the Tenth Circuit.

The third general session of the meeting convened at 9:00 o'clock Friday morning, December 30th, with the report of the committee to canvass ballots, and the report of the Treasurer.

There was a change in the usual procedure of former meetings and ad-

dresses usually delivered before the individual Section meetings were given at the general session, when thought to be of interest to the Bar at large.

At the third session of the meeting, Mr. W. E. Green of Tulsa, of the Insurance Section, discussed "Insurance Coverage in Public and Employers Liability Policies." Mr. W. C. Austin, Chairman of the Taxation Section, discussed the general subject of taxation. Mr. Hardin Ballard, Member of the Real Estate Law Section, discussed the troublesome features of the "Frazier-Lemke Act."

The session closed with the very able discussion by Hon. Eugene Rice, Judge of the U. S. District Court for the Eastern District of Oklahoma, on "New Federal Court Rules."

Following the third session, the members of the State Bar were guests of the Oklahoma City Chamber of Commerce, at their weekly noonday luncheon, which was dedicated by the Chamber of Commerce to the lawyers of the State of Oklahoma. The address at this meeting was given by the Hon. A. W. Trice of Hugo, Oklahoma, member of the American Bar Association's Special Committee on Judicial Selection and Tenure.

Report of Revision Committee Received

The fourth and concluding session was held Friday afternoon. A report was made by Francis M. Stewart, Director of Revision of the Statutes of Oklahoma, detailing in as short a time as possible the work of the Committee on Revision and of the Board of Governors, in the revision of the statutes authorized by an act of the Sixteenth Legislature empowering the Board of Governors to make a revision of the Code of the State of Oklahoma, to be presented to the Seventeenth Legislature convening in January, 1939. This was followed by an address by Mr. Curtis M. Oakes of Tulsa, author of the recent work on Oklahoma Probate practice. Mr. John Catterall, Chairman of the Corporation Law Section, made a report to the general assembly on the progress and provisions of the new corporation code, to be submitted to the Seventh Legislature by the Code Revision Committee.

Mr. Jesse L. Pullen, Assistant Attorney General, made a report to the general assembly for the Criminal Law and County Attorney Section.

Rule Making Power Urged

At the concluding session of the meeting, a resolution was adopted calling for legislation granting the Court full rule-making power, with instructions to the Legislative Committee of the State Bar to work for the enactment of such legislation in the coming Legislative session.

HON. LOGAN STEPHENSON
President, The State Bar of Oklahoma

The meeting concluded with a report as to the organization of the Board of Governors and the induction of new members.

Mr. Logan M. Stephenson of Tulsa, Oklahoma, was named as President; Mr. George A. Meacham, of Clinton, Oklahoma, First Vice President; Charles W. Mason of Nowata, Second Vice President; J. B. Moore of Ardmore, Third Vice President; Tom L. Ruble, of Taloga, Oklahoma, Treasurer, and Mr. Reuel Haskell, Jr., of Oklahoma City was again selected as Executive Secretary.

Members of the Board of Governors for the year 1939, are as follows: First District, Charles W. Mason, Nowata; Second District, Walter Arnote, McAlister; Third District, Charles France, Oklahoma City; Fourth District, Tom L. Ruble, Taloga; Fifth District, J. B. Moore, Ardmore; Sixth District, A. B. Honnold, Tulsa; Seventh District, C. B. McCrory, Okmulgee; Eighth District, C. O. Lucas, Holdenville; Ninth District, Geo. A. Meacham, Clinton.

Governors-at-Large: Logan Stephenson, Tulsa; D. Haden Linebaugh, Muskogee; Frank M. Bailey, Chickasha; Claude Monnet, Oklahoma City.

REUEL HASKEL, JR.,
Executive Secretary

Wyoming State Bar Association Holds Meeting—Presidential and Other Addresses—Officers Elected

THE Wyoming State Bar Association held its annual meeting on October 21, in the District Court Room at Laramie. Students in the Law Department of the University of Wyoming attended.

President A. W. McCollough delivered an address on "The Privileges and Obligations of an Attorney," and Justice William A. Riner of the Supreme Court read an excellent paper on "The Life and Works of Rufus Choate." Hon. William O. Wilson presented "A Discussion of the New Federal Court Rules." Reports by Dean Carl F. Arnold of the University of Wyoming Law School and the Chairmen of the respective committees were also given.

A unique and entertaining program was provided by the members of the Albany County Bar Association at the banquet given at the University Commons in the evening, at which banquet the ladies were entertained.

Visiting members of the Association were given complimentary tickets to the Homecoming game between the University of Wyoming and the Denver University on Saturday, the 22nd.

The following officers were elected for the ensuing year: President, C. R. Ellery, Cheyenne; First Vice-President, Lewis H. Brown, Rock Springs; Second Vice-President, Milward Simpson, Cody; Secretary-Treasurer, L. C. Sampson, Cheyenne. The Executive Council consists of the President and Secretary-Treasurer, *ex-officio*, and E. J. Goppert, Cody; John U. Loomis, Cheyenne, and C. E. Winter, Casper.

L. C. SAMPSON, *Secretary.*

HON. C. R. ELLERY
President, Wyoming State Bar Assoc.

Washington Letter

(*Continued from page* 169)

ning of the labor trouble in Michigan, I warned the union representatives that the sit-down strike was illegal, and, further, that its use would alienate public opinion.

"I believe in vigorous law-enforcement. However, when there is widespread disobedience to law, it is not enough to enforce the law; it is also necessary to discover and eliminate the causes of that widespread disobedience.

"So the Michigan labor situation with which I had to deal involved something more than law enforcement. I was dealing not with a few vicious law-breakers, but with thousands of self-respecting workers who felt that they had genuine grievances of long standing. It was my duty to enforce the law, but it was also my duty to hold their respect for the law. And that I could do only by making them feel that the State was not indifferent to what they honestly felt were their grievances.

"When a settlement was finally reached, the course I had followed was widely approved by the local press and by responsible spokesmen on either side."

[At this point Mr. Murphy read a letter from the late Newton D. Baker in which he expressed his "deep satisfaction" at the "happy adjustment brought about by your influence" and added: "By your intervention and success, you have heartened all of us who believe in the dignity of your office and in the necessity of preserving efficient and responsible state governments as indestructible components of a federal government dealing with federal rather than local concerns"; also a letter from Prof. Felix Frankfurter of the Harvard Law School who, after saying he knew how little an outsider like himself knows of the real complexities and difficulties that had to be resolved, went on to say: "But I also know enough to know that pertinacity, sagacity, and a profound sense of fairness were necessary to prevent an ugly situation from turning into open violence on a large scale, and finally to bring the parties to a peaceful adjustment."

He also read a letter addressed to John L. Lewis, dated Feb. 9, 1937, in which he spoke of his efforts to bring about a peaceful settlement of the controversy, and then referred as follows to the order of the Circuit Court of Genesee County finding the occupation of the General Motors Plants at Flint unlawful, ordering those in occupation to vacate the plants, and enjoining further picketing:

"With this order, lawfully entered after fair and open hearing had been accorded to both parties, it is the clear duty of all persons to comply. The constitutional authority of the courts must be respected if we are to have orderly government and an orderly peaceful society, with security for persons and property and freedom from arbitrary action and coercion. This is as important to workers as it is to employers. It is essential to the preservation of democratic principles.

"While it is also important and my firm conviction, as everyone knows, that we should employ all legitimate and lawful means to advance and protect those larger human interests which are commonly called 'human rights,' and thereby secure wider enjoyment of personal liberty and individual happiness among our people, it should not be forgotten that personal liberty will be of little value to our people if the authority and integrity of our courts are not preserved and property rights are not protected."

He also read a letter from Mr. Harry H. Bennett of the Ford Motor Co., congratulating him on his appointment as Attorney-General and expressing the opinion that Mr. Murphy had shown "a keen and ultimately fair understanding of what the separate obligations of Capital and Labor should be and where each should have a beginning and an ending"; and commendatory statements by Mr. Chrysler and President Roosevelt sent at the settlement of labor difficulties in Michigan.]

"In subsequent cases I pursued the same policy that had been followed with approval and wide satisfaction in the General Motors case. I think I prevented some strikes; I know I settled many. I am not saying that later developments were not sometimes disappointing to my hope that industrial peace had been permanently achieved. But I do feel sure that the sit-down strike has now been thoroughly discredited and I believe we have seen the end of it. Because it is an instrumentality that would undermine and destroy the vital right of the ownership and possession of private property—one of the main pillars upon which our form of economy and indeed our democracy is based.

"In the meantime, what all of us in Michigan at that time—management, labor, and government—were trying to achieve by patience with each other has been achieved. The factories of Michigan are running full time—with workable relations between management and labor. Cars are coming off the assembly line, men and women are drawing down wages, investors are making profit and orders for materials are going out through the rest of the country. In comparative terms, that is a peace which few people on the ground in Michigan in the first week of 1937 ever believed could be achieved. That is what I wanted—that is what we achieved—and that is a result of which no one who believes in the reign of law need be ashamed."

CURRENT EVENTS

Remarkable Tribute to the Retiring Attorney-General

A REMARKABLE tribute was paid to Hon. Homer J. Cummings, who had just retired from the position of Attorney General, when twelve hundred persons, including many leading representatives of the national capital's officialdom, gathered at a dinner in his honor on Jan. 11 at the Mayflower in Washington. The great gathering overflowed the large ball room and filled several adjacent rooms.

The public services of the retiring Attorney General were eulogized in brief addresses by Associate Justices Owen J. Roberts and Stanley Reed of the Supreme Court, Secretary of State Hull, Postmaster General Farley and Senator Henry F. Ashurst of Arizona, Chairman of the Senate Judiciary Committee. Frank Hogan, President of the American Bar Association, was toastmaster. A message from President Roosevelt was read, in which he repeated the tribute he paid when Mr. Cummings resigned and said he would be at the dinner "in spirit."

Justice Roberts praised the "vision and zeal" which Mr. Cummings had brought to the discharge of his duties and declared that the Federal courts now have, as a result of his six years in office, "an integrated and better administration of justice." Secretary Hull traced briefly Mr. Cummings' long career as a political leader, lawyer and public official and credited him with a major role in the affairs of the remarkable period in which we live. Senator Ashurst and Postmaster General Farley followed with their tributes and Justice Reed praised Mr. Cummings for having given the Department of Justice the "vital spark of leadership which enabled it to stand up and do its work in one of the most trying administrations in our history."

Speaking of Mr. Cummings as "a great man," Justice Reed presented him with a complete surprise—the first volume off the press of "Selected Papers of Homer Cummings," which had been gathered quietly and published without his knowledge. The compilation

was made by Carl Brent Swisher, professor of political science at the Johns Hopkins University. Each guest at the banquet also was given a copy of the new book as a souvenir of the occasion.

Earlier in the dinner, former Assistant Attorney General William Stanley presented Mrs. Cummings with a beautiful bowl. The toastmaster gave the honor guest the chair in which he has sat at cabinet meetings, assuring him that "complete title to it had been obtained" and it was his henceforth.

In his reply, Mr. Cummings said the occasion "quite overtopped" anything he had ever known. In expressing his gratitude for the tribute, he said he did not want his assembled friends to think he was insensible to the honor he had been given in serving "one of those great spirits that come to a people only once in several generations." His six years in office, he said, had been "a glorious adventure." He took occasion to commend his successor, Attorney General Frank Murphy, who sat at the speakers' table, as "a great character, a great spirit," and to predict for him a splendid administration.

New Jersey State Bar and American Bar Join in Federal Rules Institute

THE New Jersey State Bar Association and the American Bar Association, through its Legal Education Section, will join forces in promoting an institute on the new Federal Rules, to be held in Newark on February 16 and 17. The New Jersey institute will be the third on this subject in which the American Bar Association has actively participated. Sessions will be held from 4:30 to 6:00 on the afternoon of each of the two days and from 7:30 to 9:30 in the evening. Speakers who have tentatively accepted include Mr. Edgar B. Tolman of Chicago, Secretary and member of the Supreme Court Advisory Committee; Robert G. Dodge of Boston, also a member of that Committee; Professor William W. Dawson, of the Western Reserve University Law School; Mr. Samuel Kaufman of Newark who will discuss the new Rules in relation to New Jersey practice; and Prof. Edmund M. Morgan, of the Harvard Law School, and others.

Judge Guy L. Fake, the senior United States District Judge in New Jersey, will preside at the first session, Judge John Boyd Avis, also of the United States District Court, will be the next presiding officer, and on Friday the gavel will be wielded by Judge Phillip Forman of the United States District Court and by Mr. Arthur T. Vanderbilt, past President of the American Bar Association.

A small admission fee will be charged and arrangements will also be made to give the opportunity to those present to purchase the two books on the subject published by the American Bar Association, the Proceedings of the Cleveland institute with the Rules and the Notes of the Advisory Committee, and the Proceedings of the Washington and New York institutes.

The sessions in Newark will be held in the auditorium of the Central High School. Bar associations of northern New Jersey which are cooperating include the following: Bergen County Bar Association, Essex County Bar Association, Essex County Lawyers Association, Hudson County Bar Association, Middlesex County Bar Association, Passaic Bar Association, and the Bar Association of Union County. The Chairman of the Arrangements Committee is Mr. Sylvester C. Smith, Jr., State Delegate to the American Bar Association from New Jersey and Chairman in 1937 of the Special Committee on the Supreme Court Proposal. Other members of the Committee are: Arthur T. Vanderbilt, Merritt Lane, Josiah Stryker, Joseph Harrison, Samuel Kaufman, Gerald McLaughlin and Morris P. Skinner of Newark, John L. Milton, Jr., and James D. Carpenter, Jr. of Jersey City, Judge William M. Seufert of Englewood, Leroy VanderBurgh of Hackensack, John P. McGuire of Perth Amboy, John Grimshaw, Jr., of Paterson, Walter L. Hetfield, III, of Plainfield, Julius Lichtenstein of Hoboken, and Robert S. Snevily of Westfield.

Louisiana, Mississippi, and Pennsylvania Legal Institutes Attract Large Attendance

REPORTS received from legal institutes held within the last month indicate that practicing lawyers are attending these meetings in large numbers and that the new Federal Rules are still proving an excellent drawing-card as a subject. The two-day Institute on this topic, sponsored by the New Orleans Bar Association on December 16 and 17, drew what local bar officials described as "the greatest outpouring of lawyers" ever occurring under its sponsorship. Total registration was well over six hundred and included lawyers from Mississippi, Texas, Arkansas and Alabama, as well as from New Orleans. A registration charge of $2.00 was made for lawyers and $1.00 for law students. Judges and members of the faculty of the law schools of Tulane, Louisiana State and Loyola, which joined with the Bar Association in sponsoring the Institute, were given complimentary tickets. Speakers the first day included Mr. Edgar B. Tolman of Chicago and Mr. Monte M. Lemann of New Orleans, and on the second day, Dean Charles E. Clark of the Yale University Law School, recently appointed to the Circuit Court of Appeals for the Second Circuit, and Judge Joseph C. Hutcheson, Jr., of the United States Circuit Court of Appeals for the Fifth Circuit. On Saturday night a banquet was held at the famous Antoine's restaurant, at which Chief Justice Charles A. O'Niell of the Louisiana Supreme Court was toastmaster. Remarks were made by Charles F. Fletchinger, general Chairman of the Institute, Mr. Tolman, Dean Clark, and Mr. W. H. Watkins, Sr., of Jackson, Mississippi.

On Jan. 13 an Institute was held under the auspices of the University of Mississippi Law School for the purpose of making a study of the new Federal Rules of Practice in the District Courts of the United States. The results of this Institute were most gratifying. Three hundred lawyers were in attendance and enjoyed most thoroughly the program and the fine work done by the lecture staff.

Much interest has been aroused among the members of the bar with reference to the Institute plan of studying problems which are of vital interest to the legal profession. The Law School has been requested to foster further Institutes of the above nature.

The lecture staff consisted of Judge Joseph C. Hucheson, Jr., 5th Circuit Court of Appeals, Judge V. A. Griffith of the Mississippi Supreme Court, Judge Allen Cox, Federal District Judge for North Mississippi, Hon. Walter P. Armstrong of the Memphis Bar, and Hon. Monte Lemann of the New Orleans Bar.

At the annual meeting of the Pennsylvania Bar Association in Hershey, Pennsylvania, on January 5, 6 and 7, the opening session consisted of a two-hour institute on the Federal Rules, conducted by Professor Edson R. Sunderland of the University of Michigan Law School, with particular attention to Discovery, Depositions and Pretrial Procedure. On the following afternoon Professor E. M. Morgan of the Harvard Law School discussed Pleading, Joinder of Parties and Cross Complaints under the new rules.

Plans for institutes this spring are now being made by many of the associations which have been successful in holding institutes on the Federal Rules during the fall. The Dade County Bar Association of Miami, Florida, and the University of Miami Law School are

jointly sponsoring an institute in February to be addressed by Professor Walter Barton Leach of the Harvard Law School on "Drafting of Wills and Trusts; The Use of the Powers of Appointment; and The Avoidance of the Rule Against Perpetuities."

Preliminary Statement by the Special Committee on Judicial Salaries

THIS is a legislative year! During 1939, the legislatures of 44 States will meet in regular sessions; and, although the grist of bills will be large in number, there are indications that the legal brethren are alert to the needs of definite action for the support of the judiciary.

From the recent correspondence of this Committee, it appears that currently State Committees will put special emphasis upon retirement plans and judicial pensions. Five States report substantial progress upon the subject, and there may be others similarly engaged but unknown to this Committee.

The prevailing sentiment seems to be that now is a propitious time to advance the cause of adequate compensation upon judicial retirement. Twenty-two States already have such laws. The trend of social legislation is in that direction.

For purposes of comparison and as a guide for those contemplating such a measure, this Committee has available a compilation of existing statutes upon this subject. The edition is limited, but copies may be had upon request to the undersigned.

In other States it is felt that the most pressing need is for actual increases in salaries or for legislative authority for the more populous counties or cities to pay some amount in addition to the State salaries. In such States these matters are being given a preference.

WALTER S. FOSTER, Chairman.

Death of Justice L. B. Day of Nebraska

THE American Bar Association suffered a real loss in the death of Associate Justice L. B. Day of the Supreme Court of Nebraska, who passed away on Tuesday, Nov. 22, in Omaha. He died at forty-nine years of age—in the prime of life and in the full tide of his useful and distinguished career.

As Chairman of the Resolutions Committee of the Assembly of the Association, he rendered important services in a position of great responsibility. His unwearied industry and great ability in the discharge of his duties are attested by all who were associated with him.

At the opening of the Supreme Court the morning after Judge Day's death, Chief Justice Robert G. Simmons made the following statement:

"We have learned with profound sorrow of the death of Associate Justice L. B. Day, who passed away last evening at the Lincoln General hospital. His death in the prime of life is a distinct loss to the court, the bar, and the public. He brought to the Supreme court preparation for judicial service of a high order.

"He entered the practice of the law after graduation from the College of Law at Creighton University. From a successful practice at the bar in Omaha he was elected judge of the District Court of the Fourth Judicial district of Nebraska. In the midst of a notable career on the District bench he was called to the Supreme Court. He was a member of this court for nine years. His work here was characterized by purity of purpose and an exalted sense of judicial duty and responsibility. . . ."

The *Lincoln Star* editorially said of him in part:

"His elevation to the Supreme court of Nebraska brought to that high tribunal the services of a man, who had a keen and penetrating mind, the highest sense of honor and integrity, an unselfish devotion to his country and its welfare, and indefatigable habits of industry. He was honored and respected by the lawyers and reverenced by the laymen. He was a pillar of strength to the court. And his influence extended far beyond the boundaries of Nebraska."

Judge Day was chosen President of the Nebraska Bar Association in 1935. It was while he was President of that organization that plans were definitely formulated for the integrated Bar in Nebraska. He was also a strong advocate of high educational qualifications for admission to the profession.

Institute on Administrative Law by George Washington University

THE program for a series of three meetings on the subject of Administrative Law to be given under the auspices of the George Washington University Law School in Washington, D. C. on Feb. 3 and 4 has been announced, as follows: On Friday, at the opening session, Prof. E. Blythe Stason, of the University of Michigan Law School, will speak on "Study and Research in Administrative Law," and he will be followed by Commissioner Clyde B. Aitchison, of the Interstate Commerce Commission, whose topic will be "Reforming the Administrative Process."

Saturday afternoon Dean James M. Landis, of the Harvard Law School, will speak on "Administrative Policies and the Courts," followed by: Prof. Kenneth C. Sears, of the University of Chicago Law School, who will discuss the effect of the Morgan case upon administrative procedure. Saturday evening, Mr. Louis Caldwell, of Washington, D. C., former counsel for the Radio Commission, will address the Institute on "An Attorney's Problems before Administrative Bodies" with special reference to the Federal Communications Commission. Hon. William J. Dempsey, General Council of this Commission, will follow Mr. Caldwell.

The meetings will be thrown open for discussion following the formal addresses. The lectures are open to the public. The Chairman of the Program Committee is Professor James F. Davison of the George Washington Law School.

Nominating Petitions

OKLAHOMA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Alvin Richards, Tulsa, Oklahoma, for the office of State Delegate for and from the State of Oklahoma, to be elected in 1939:

Harvey J. Lambert, Turner M. King, A. W. Trice, L. H. Harrell, Ben Hatcher, of Ada.

Lois Straight, L. A. Rowland, Alton H. Rowland, John H. Kane, Donald Prentice, of Bartlesville.

W. E. Utterback, of Durant.

A. G. C. Bierer, Jr., Fred W. Green, A. G. C. Bierer, of Guthrie.

C. A. Ambrister, Enloe V. Vernor, C. A. Conway, of Muskogee.

Walter J. Arnote, of McAlester.

Roger L. Stephens, W. R. Wallace, Ray A. Tolbert, John H. Cantrell, Joe A. McCloud, J. R. Spielman, Duke Duvall, V. P. Crowe, Lynn Adams, Norman E. Reynolds, Byrne A. Bowman, Charles E. France, of Oklahoma City.

Paul W. Cress, of Perry.

Felix Duvall, of Ponca City.

Ray S. Fellows, Jewell Russell Mann, T. Austin Gavin, L. G. Owen, C. H. Rosenstein, Norma Wheaton, Frank Settle, Clay Tallman, Hunter L. Johnson, Saul A. Yager, Wilbur J. Holleman, Villard Martin, Fenelon Boesche, Roscoe E. Harper, Harry Campbell, Kavanaugh Bush, Charles R. Fellows, Earl Sneed, Jr., Roger S. Randolph, Albert Bell, Victor C. Mieher, E. D. Gillespie, R. D. Hudson,

W. E. Hudson, Sam Clammer, R. A. Kleinschmidt, of Tulsa.

H. W. Carver, R. J. Roberts, of Wewoka.

SOUTH CAROLINA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Alva M. Lumpkin, Columbia, South Carolina, for the office of State Delegate for and from the State of South Carolina, to be elected in 1939:

P. F. Henderson, of Aiken.

Sam'l L. Prince, John K. Hood, Jr., of Anderson.

George L. Buist, Augustine T. Smythe, H. L. Erckmann, Benj. Scott Whaley, J. Waties Waring, D. A. Brockinton, John I. Cosgrove, Henry Buist, B. Allston Moore, Harold A. Mouzon, Frederick H. Horlbeck, Malcolm E. Crosland, Coming B. Gibbs, Lionel K. Legge, of Charleston.

Jos. L. Nettles, Pinckney L. Cain, J. Waties Thomas, W. C. McLain, R. B. Herbert, James B. Murphy, Alice Robinson, D. W. Robinson, Jr., J. E. Belsar, W. M. Shand, Christie Benet, Douglas McKay, of Columbia.

Sam J. Royal, A. L. Hardee, of Florence.

C. F. Haynsworth, H. J. Haynsworth, E. M. Blythe, A. C. Mann, of Greenville.

L. W. Perrin, C. E. Daniel, H. K. Osborne, Leon Moore, Thos. B. Butler, of Spartanburg.

George D. Levy, Shepard K. Nash, I. C. Strauss, John D. Lee, of Sumter.

WASHINGTON

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Lawrence R. Hamblen, Spokane, Washington, for the office of State Delegate for and from the State of Washington, to be elected in 1939:

O. B. Thorgrimson, Frank M. Preston, Corwin S. Shank, Lawrence Bogle, Harry A. Rhodes, Judson F. Falknor, Cassius E. Gates, John P. Garvin, A. N. Whitlock, S. Harold Shefelman, Elmer E. Todd, George Donworth, Charles S. Albert, Frank E. Holman, E. L. Skeel, W. V. Tanner, Edward W. Allen, William G. McLaren, James B. Howe, Ford Q. Elvidge, of Seattle.

A. E. Russell, W. B. Chandler, R. W. Nuzum, Lawrence H. Brown, R. E. Lowe, C. D. Randall, Joseph McCarthy, Alan G. Paine, W. S. Gilbert, Sidney H. Wentworth, H. E. T. Herman, B. H. Kizer, H. M. Hamblen, Lester Edge, of Spokane.

ILLINOIS

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate R. Allan Stephens, Springfield, Illinois, for the office of State Delegate for and from the State of Illinois, to be elected in 1939:

B. M. Chiperfield, of Canton.

Clarence W. Heyl, E. J. Galbraith, William L. Eagleton, Roscoe Herget, O. P. Westervelt, John M. Elliott, E. D. McLaughlin, R. J. Kavanagh, J. T. Hunter, Frederick V. Arber, Charles V. O'Hern, Frank T. Miller, Jos. A. Weil, Claude U. Stone, George A. Shurtleff, Hiram E. Todd, John M. Niehaus, Jr., of Peoria.

Cairo A. Trimble, Carey R. Johnson, of Princeton.

C. N. Hollerich, of Spring Valley.

Arthur H. Shay, of Streater.

Clarence Diver, Albert L. Hall, Charles E. Mason, W. R. Behanna, Sidney H. Block, Eugene M. Runyard, H. C. Litchfield, A. F. Beaubien, of Waukegan.

ILLINOIS

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Charles M. Thomson, Chicago, for the office of State Delegate for and from the State of Illinois, to be elected in 1939:

Philip R. Davis, Robert N. Golding, W. A. Keplinger, Joseph H. Pleck, Keith Masters, Dudley F. Jessopp, William Wilson, A. J. Pflaum, E. C. Kohlsaat, Leo W. Hoffman, Morton John Barnard, Max Swiren, George A. Novak, Glenn E. Baird, Francis J. Naphin, William E. Dever, M. B. Kennedy, Warren B. Buckley, Lawrence J. West, Joseph G. Gorman, Abraham Redman, William L. Hunter, Walter P. Murphy, Albert Langeluttig, William J. Nealon, Alfred T. Carton, Arthur D. Chilgren, James H. Douglas, Jr., Milton H. Gray, Donald P. McFadyen, Morrison Waud, Erwin W. Roemer, Charles T. Shanner, Ralph M. Shaw, Harry J. Dunbaugh, John D. Black, T. A. Reynolds, Charles Aaron, John S. Lord, E. E. McInnis, Guy M. Peters, Charles Cranston Spray, Roy O. West, Samuel B. Kraus, Owen A. West, P. B. Eckhart, L. C. Jesseph, Henry A. Gardner, Joseph E. Fitch, Lloyd D. Heth, Frederick Z. Marx, Oscar C. Miller, William R. T. Ewen, Richard J. Finn, William H. Sexton, Joseph F. Grossman, Walter T. Fisher, Charles S. Pratt, S. Ashley Guthrie, Ning Eley, Lambert Kaspers, William McKinley, Elmer M. Leesman, Frederick Dickinson, F. Howard Eldridge, Isaac S. Rothschild, Grover C. McLaren, Rudolph B. Salmon, Charles F. Hough, John W. Kearns, Joseph M. Larimer, Irving Zimmerman, Cushman B. Bissell, Irvin H. Fathchild, Sidney C. Nierman, Edward Hershenson, Casper W. Ooms, Horace Dawson, David J. Shipman, William H. Arpaia, F. W. Renwick, Jr., George E. Woods, Lionel G. Thorsness, Ernest F. Staub, Herbert C. Paschen, French Waterman, Henry P. Chandler, and Clarence P. Denning, Harry G. Hershenson, Lawrence C. Mills, Frederic Burnham, George B. McKibbin, Charles O. Loucks, Charles P. Megan, Amos C. Miller, Austin L. Wyman, B. F. Langworthy, Carl B. Latham, Francis X. Busch, Lowell Hastings, John E. Owens, Thomas L. Owens, Roger Q. White, Helen M. Cirese, Clyde E. Shorey, Mitchell D. Follansbee, Gerhardt S. Jersild, William B. Hale, Alfred Beck, Graydon Megan, Herbert M. Lautman—all of Chicago.

NOTICE OF TIME FOR FILING PETITIONS FOR NOMINATIONS UNDER ARTICLE VIII, SECTION 2, OF THE CONSTITUTION OF AMERICAN BAR ASSOCIATION.

In pursuance of instructions from the Board of Governors, notice is hereby given that all petitions for "Other Nominations" for any office to be filled at the 1939 Annual Meeting of the American Bar Association, in accordance with the provisions of Article VIII, Section 2, of the Constitution of the American Bar Association, must be on file with the Secretary in the Headquarters Office, 1140 North Dearborn Street, Chicago, Ill., not later than Wednesday, May 31, 1939, at 5 o'clock P. M., Central Standard Time. Such nominating petitions, however, may not be filed earlier than May 1, 1939.

HARRY S. KNIGHT, SECRETARY,
AMERICAN BAR ASSOCIATION.

Ohio Judicial Council Considers Rules

THE Ohio Judicial Council, according to the Ohio Bar Association Report (Jan. 2, 1939) has been meeting regularly for the past eighteen months to consider which of the new Federal Rules should be adopted in that State. It has decided not to recommend the adoption of all of those rules as so many of them are so similar to the local practice that a change would be more confusing than advantageous. However, it decided to recommend some changes in the present code of procedure.

Constructive Recommendations in Last Report of Attorney General Cummings

THE "swan song" of Hon. Homer J. Cummings as Attorney General of the United States was characteristically energetic, constructive and forward-looking. It is contained in the statements and recommendations of his Annual Report as submitted to the Congress now in session:

He begins by referring to the adoption of the New Rules of Civil Procedure, and states that he has directed that the "Department of Justice should maintain a service for all Government attorneys, United States Attorneys, and the courts, containing a current compilation of all decisions, reported and unreported, construing or applying the new rules. While the primary purpose of this activity is to assist the attorneys of the Department of Justice and the United States Attorneys in the field in handling Government litigation, it is hoped that it may also constitute an aid in maintaining the uniformity the rules contemplate."

Then follows his recommendation for additional judicial personnel, in line with the views of the Judicial Conference; his renewal of a former recommendation that a bill be passed to provide an "Administrative Office for the United States Courts," similar to §3212; and a recommendation for the enactment of legislation to authorize the Supreme Court to promulgate rules of practice and procedure for criminal cases, prior to verdict or plea of guilty. He points out, in this connection, that this is the only part of the field of procedure which may not now be governed by rules made by the Supreme Court and declares that the legislation proposed is needed to create a "uniform, simplified and comprehensive system."

He next recommends a constitutional amendment providing for the compulsory retirement of Federal Judges at the age of 70, with provision for full pay upon such retirement, such amendment to be applicable by its express terms, only to those appointed after its adoption. "In addition," he says, "some statutory provision (presumably on a prorata basis) should be made for the voluntary retirement of Federal Judges who have become disabled prior to reaching the age of 70. Not infrequently instances of this kind have occurred. Such a situation is unfair to the incapacitated judge and detrimental to the public interest."

The report next points out the delays in litigation, declaring that statistics indicate that "there is not a single district, with the exception of New Hampshire, in which the business of the United States district court is 'current' within any proper definition of that term;" comments on the advantages in the treatment of juvenile delinquents afforded by the Juvenile Delinquency Act of June 16, 1938; calls attention to the disparities of sentences imposed in different districts, and even by different judges in the same district, for identical offenses involving similar states of facts, as something that should be corrected, perhaps by conferences of judges within the various circuits, who might "develop a method of treatment that would iron out the more extreme difference;" recommends the adoption of the "public defender" for the Federal judicial system, and renews a former recommendation that "revolvers and pistols should be brought within the scope of the National Firearms Act of 1934."

The following recommendations heretofore made for the enactment of amendments to the criminal law are renewed; to permit the defendant to waive indictment by grand jury and to consent to prosecution by information; to require a defendant who proposes to rely on a defense of alibi to give to the prosecution notice of that fact before trial; to permit comment on the defendants' failure to testify; to confer jurisdictions on United States Commissioners to try petty offenses committed on Federal Reservations; to extend the Criminal Appeals Act so as to permit the Government to appeal from any order sustaining a demurrer or like pleading, the present law being limited to cases involving the constitutionality or the construction of statutes.

On the subject of "Tort Claims Against the United States," the report says, in part: "While I am not ready at this time to suggest a complete waiver of immunity to suits in tort against the United States, in view of the fact that such action might subject the Government to claims for assault, false imprisonment, and the like, in which the damages are frequently speculative and which are difficult to defend, I recommend legislation to permit suit to be brought against the Government for property damage or personal injuries caused by the negligence of a Government officer or employee acting in the scope of his duties. In view of the difficulties that the Government may at times encounter in making a proper defense to such suits, the rights of the Government should be protected by a suitable statute of limitations and, when the case is brought in the Court of Claims, a right to an examination before trial. Studies of this question have been made in the Department of Justice, which will be made available to the appropriate committees of the Congress, if desired."

The report also recommends an appropriation which will permit an increase in the salaries of Assistant United States Attorneys "to a more reasonable level "and better financial provision for the Federal Bureau of Investigation; comments on the "Prison Building Program;" and recommends, under the title of "Probation and Parole," the enactment of proper legislation to provide that hereafter probation officers shall be appointed by the Attorney General; and declares, under the head of "Crime Prevention," that "I am more than ever persuaded that the Federal Government must ultimately enter upon this field. Naturally it will involve an intensive study of promising means of crime prevention and the correlation of efforts in that

direction on the part of governmental agencies—Federal, State, and local—on the one hand, and private agencies, on the other. This is a duty that cannot much longer be postponed."

The report concludes with the following statement as to "Anti-trust Laws:"

"This year the Department of Justice adopted a policy, which I believe will render the enforcement of the antitrust laws more efficacious than it has been heretofore. At the commencement of an investigation or proceeding in a matter involving wide public interest the Department issues a public statement indicating in sufficient detail the particular practices that are sought to be condemned, the economic purposes to be served, and the reasons for the particular action taken. The advantages of such an arrangement are clearly set forth in the appended report of Assistant Attorney General Arnold, to which I invite particular attention.

"Manifestly the Antitrust Division of the Department of Justice is entering a widening field of activity, and, in my judgment, this is as it should be. It is not unlikely that the studies now being made by the congressional committee dealing with monopoly will result in further legislation which may extend our jurisdiction. I have long thought that a thorough and comprehensive study should be made of the antitrust laws, with a view to their restatement and clarification. In a special communication to the President, dated April 27, 1937, which was given considerable publicity at the time, I made such a recommendation, and I renewed it in my last Annual Report. It is gratifying to see this work going forward.

"I advert to these matters primarily for the purposes of stressing the fact that the conduct of antitrust litigation is highly expensive. It is estimated that one major Sherman law suit costs the Department of Justice approximately $100,000 per year. Whether we consider the laws already on the statute books, or whether we consider additions thereto that may hereafter be enacted, it is important to bear in mind that any plan that may be devised will not operate automatically. It is futile to pass laws, or even to retain existing laws, with the expectation that they will be enforced unless the Department of Justice is supplied with personnel and appropriations adequate to the task. To adopt any other course is to 'keep the word of promise to our ear and break it to our hope.'"

Replies to Cincinnati Institute Questionnaire

THE replies to the questionnaire submitted to those attending the recent fifth Conference of the Cincinnati Bar Association under the auspices of the Ohio State Bar Association at Cincinnati, on "The New Federal Rules and Proposed Changes in Ohio Procedure, have been contributed and are printed in the Ohio Bar Association Report. There were one hundred and fifteen replies, which are summarized as follows:

1. Do you think procedure should be controlled by rules of court? Yes 98—No 11.

2. Do you favor the enactment of a statute authorizing the supreme court to regulate procedure by court rule? Yes 97—No. 15.

3. Do you favor the Federal Rule respecting the statement of plaintiff's claim which attempts to abolish distinctions between statements of fact and conclusions? Yes 88—No 26.

4. Do you favor the permission of pleading in the alternative? Yes 101—No. 12.

5. Do you favor the permission of pleading inconsistent defenses? Yes 68—No. 43.

6. Do you favor permitting separate plaintiffs to join if their claims arise out of the same transaction or series of transactions and common questions of law or fact will arise? Yes 71—No. 36.

7. Do you favor joining defendants if the claims against them arise out of the same transaction or series of transactions and common questions of law or fact will arise? Yes 82—No. 26.

8. Do you favor joining defendants against whom claims in the alternative are made? Yes 68—No 41.

Civil Rights Program Adopted by Chicago Bar Association

THE Chicago Bar Association will undertake a program for the defense and furtherance of civil rights, according to a report of its new Committee on Civil Rights which was approved on Jan. 9 by the Board of Managers. Following similar action by the American Bar Association, the committee was appointed last October in recognition of the need for more active support by the legal profession of such constitutional rights as freedom of speech, freedom of the press and freedom of assembly, against destructive forces of every nature.

The plans of the Bar Association include aiding in the defense of the civil rights of individuals in appropriate cases, recommending and promoting changes in present law and practice in an effort to prevent and reduce violations of civil rights, and a public information program designed to arouse interest in the meaning and value of the civil rights guaranteed by the constitution.

"What is happening elsewhere in the world reminds us again of the importance of constant and vigilant protection of our own liberties," said Adlai E. Stevenson, Chairman of the Civil Rights Committee. "We are now at work on the practical details of our program. Sub-committees will be appointed to consider how the Association should handle complaints of violation of civil rights, what measures should be taken to prevent future violations, and the most effective ways of arousing public interest in the never-ending struggle to protect our liberties."

Chicago Law Institute Elects Officers

At the Annual Meeting of the members of The Chicago Law Institute held in their rooms at 1025 County Building on Saturday, January 21, 1939, the following were elected officers and board of managers for the year 1939:

President, Robert F. Kolb; First Vice-President, Paul M. Godehn; Second Vice-President, Louis P. Haller; Librarian, William S. Johnston; Treasurer, Roy C. Osgood; Secretary, Frank S. Sims.

Board of Managers: Robert Collyer Fergus, James Rosenthal, Charles C. Spencer, Justus Chancellor, John D. Black, Frederick Z. Marx, John E. MacLeish, Jacob G. Grossberg, Willard L. King.